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Fourth report on nationality in relation to the succession of States

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I. Introduction

1. The nationality of legal persons in relation to the succession of States is part of the topic that the International Law Commission decided to include in its agenda at its forty-fifth session, in 1993, and which was initially entitled "State succession and its impact on the nationality of natural and legal persons".[1] In 1996 the Commission changed the title to "Nationality in relation to the succession of States", which continues to cover both the nationality of individuals and that of legal persons.

2. In paragraph 8 of its resolution 51/160 of 16 December 1996, the General Assembly, having taken note of the completion of the preliminary study of the topic by the Commission, requested the Commission to undertake the substantive study of the topic. It endorsed the Commission's intention to separate the consideration of the question of the nationality of natural persons from that of the nationality of legal persons and to give priority to the former.[2]

3. In paragraph 5 of its resolution 52/156 of 15 December 1997, the General Assembly "invit[ed] Governments to submit comments and observations on the practical problems raised by the succession of States affecting the nationality of legal persons in order to assist the International Law Commission in deciding on its future work on this portion of the topic".

4. Since 1993, the General Assembly, when considering the part of the Commission's report relating to this topic, repeatedly invited Governments to submit materials including national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to the topic.[3] The documentation provided thus far covers, however, mainly the problem of the nationality of individuals.

II. History of the consideration of the nationality of legal persons in relation to the succession of States

A. Forty-seventh to forty-ninth sessions of the Commission

5. At its forty-seventh to forty-ninth sessions, the Commission focused on the nationality of natural persons, while the nationality of legal persons was at the margin of its attention.[4] There has been, however, some discussion concerning the nationality of legal persons during

[1] *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10* (A/48/10), para. 440.

[2] The division of the topic into two parts was suggested by the Special Rapporteur in his first report (A/CN.4/467, para. 50), and again in his second report (A/CN.4/474, paras. 169-172). It was also recommended by the Working Group (established at the forty-seventh session of the Commission) during the forty-eighth session of the Commission (see *Official Records of the General Assembly, Supplement No. 10* (A/51/10), para. 80). When considering the recommendations by the Working Group, the Commission undertook, *inter alia*, to take "the decision on how to proceed with respect to the question of the nationality of legal persons [only] upon completion of the work on the nationality of natural persons and in light of the comments that the General Assembly may invite States to submit on the practical problems raised by a succession of States in this field" (ibid., para. 88 (d)).

[3] See General Assembly resolution 48/31 of 9 December 1993, para. 7; resolution 49/51 of 9 December 1994, para. 6; and resolution 50/45 of 11 December 1995, para. 4.

[4] This work resulted in the adoption, on first reading, of the draft articles on nationality of natural persons in relation to the succession of States; see *Official Records of the General Assembly, Supplement No. 10* (A/52/10), para. 43.

the preliminary study of the whole topic, when the Commission considered the first and the second reports of the Special Rapporteur.

6. The first report,[5] in paragraphs 46 to 50, addressed the question of the nationality of legal persons. Two main points have been underlined by the Special Rapporteur were: first that *there exists no rigid notion of nationality with respect to legal persons*, and secondly, that *there is a limit to the analogy that can be drawn between nationality of individuals and the nationality of legal persons*.

7. Concerning the first point, the report stressed that, even in the legal regimes in which the concept of nationality of legal persons is recognized, different tests of nationality are used for different purposes. In many cases the traditional criterion of the place of incorporation and the place where a corporation has a registered office establish only a prima facie presumption of the bond of nationality between the corporation and the State. It is a usual practice of States to expressly provide, in a treaty or in their domestic laws, which legal persons may enjoy the benefits of treaty provisions reserved to "nationals" or to define as "nationals" corporations for the purposes of application of national laws in specific fields (fiscal law, labour law, etc.).[6]

8. As regards the second point, the Special Rapporteur recalled the warning by most authors that, while sometimes convenient, the analogy between the nationality of natural persons and that of legal persons may be misleading.[7]

9. In the second report, the problems of nationality of legal persons were considered in chapter III.[8] The main purpose of that chapter was to illustrate briefly the purposes for which the determination of the nationality of legal persons may be needed. Four areas have been identified in which the problem of the nationality of legal persons may arise: conflicts of laws, diplomatic protection, treatment of aliens and State responsibility.[9]

10. A number of rules under *private international law* are designed to connect a legal person to the laws of a State. The nationality of the legal person is one such criterion for connection.[10] But to be used as such, the nationality itself has first to be determined. The nationality is usually established by reference to one or more elements such as incorporation or formation, registered office, centre of operations or actual place of management, and, sometimes, control or dominant interest. Despite their common characteristics, the various

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[5] A/CN.4/467, paras. 46-50.

[6] Ibid., para. 49.

[7] According to *Oppenheim's International Law*, "those rules of international law which are based upon the nationality of individuals are not always to be applied without modification in relation to corporations. Various considerations militate against attributing to the nationality of corporations the same consequences as attach to the nationality of individuals: those include the manner in which corporations are created, operate and are brought to an end, their development as legal entities distinct from their shareholders, the inapplicability to companies of the essentially personal conception of the allegiance which underlies the development of much of the present law regarding nationality, the general absence in relation to companies of any nationality legislation to provide a basis in municipal law for the operation of rules of international law, the great variety of forms of company organization and the possibilities for contriving an artificial and purely formal relationship with the State of 'nationality'." Sir Robert Jennings and Sir Arthur Watts, eds., *Oppenheim's International Law*, 9th ed., vol. I (London, Longman, 1992), pp. 860-861.

[8] A/CN.4/474, paras. 140-167.

[9] Ibid., para. 142.

[10] Under Anglo-American law, the norms relating to the legal status of commercial corporations do not include nationality as a criterion for connection with the domestic law, but go directly to incorporation or formation. Cf. Lucius Caflisch, "La nationalité des sociétés commerciales en droit international privé", *Annuaire suisse de droit international*, vol. XXIV (1967), pp. 130-142.

legislations are far from uniform. The criteria are sometimes combined, particularly in many treaties on establishment and trade.[11] International conventions, however, frequently refer to the nationality of commercial corporations without regulating how that nationality is to be determined.

11. As in the case of an individual, nationality is a prerequisite for the exercise, by a State, of *diplomatic protection* of a legal person.[12] In the *Barcelona Traction* case, the International Court of Justice observed that:

> "The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist".[13]

12. According to some authors, for determining the nationality of a legal person in the context of diplomatic protection, the criterion of substantial interest or control becomes much more relevant than in private international law. Other authors, however, warn against the "lifting of the corporate veil" to which acceptance of the "control test" would lead and consider it quite inappropriate even in the area of diplomatic protection.[14]

13. The concept of the nationality of legal persons seems to be generally accepted also in the sphere of the *law of aliens*.[15] The nationality of legal persons acquires particular importance in time of hostilities. Its determination, however, differs from that under private international law. To categorize foreign corporations as "nationals" of enemy States, criteria such as that of control by enemy nationals have often been used. This was, e.g. the case of the United States Executive Order No. 8389 of 10 April 1940 which defined the term "national" of Norway or Denmark.[16] It has, however, been observed by some authors that

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[11] For examples of such treaties see A/CN 4/474, footnote 255.

[12] "As international law grants to each State the right to proffer diplomatic protection to its nationals, a corporation, in order to obtain diplomatic protection, would have to prove that it possessed the nationality of the State concerned." See Seidl-Hohenveldern, *Corporations in and under international law* (Cambridge, Grotius Publications, 1987), p. 7.

[13] *Case concerning the Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports, 1970*, p. 42.

[14] Seidl-Hohenveldern stresses that "in the *Barcelona Traction* case the International Court of Justice, while admitting that the corporate veil may be lifted under certain circumstances, refused to do so in the case before it. The Court would have accepted the *jus standi* of the shareholders' home State had the corporation ceased to exist. On the demise of the corporation its shareholders become the owners of its assets on a pro rata basis." Op. cit., p. 9.

[15] Under English law and American law, the nationality of legal persons is dependent on the criterion of incorporation or formation. French law determines it by reference to relevant criteria in the area of conflicts of laws – the actual place of management or sometimes incorporation or formation – while under German law it is generally determined on the basis of the registered office. L. Caflisch, op. cit., pp. 130, 133 and 137.

[16] According to the Order "the term 'national' of Norway or Denmark shall include ... any partnership, association or other organization, including any corporation organized under the laws of, or which on April 8, 1940, had its principal place of business in Norway or Denmark or which on or after such date has been controlled by, or a substantial part of the stock, shares, bonds, debentures, or other securities of which has been owned or controlled by, directly or indirectly, one or more persons, who have been, or who there is reasonable cause to believe have been, domiciled in, or the subjects, citizens or residents of Norway or Denmark at any time on or since April 8, 1940, and all persons acting or purporting to act directly or indirectly for the benefit or on behalf of the foregoing." (5 Fed. Reg. 1400, 1940).

the question was not so much of determining nationality as of establishing the "enemy nature" of the corporation.[17]

14. In the field of the *responsibility of States* under international law for certain acts or activities of their nationals, the nationality of legal persons is usually based on the control of the corporation or on the notion of "intérêt substantiel".[18] The problem of the nationality of legal persons may occur also in relation with the application of Security Council resolutions concerning sanctions against certain States.

15. Thus, for example, in its resolution 883 (1993) of 11 November 1993, the Security Council, acting under Chapter VII of the Charter of the United Nations, decided that all States shall freeze funds and financial resources "owned or controlled, directly or indirectly, by:

(a) The Government or public authorities of Libya, or

(b) Any Libyan undertaking".[19]

16. The Committee established by the Security Council[20] recognized that "States may face difficulties in deciding about the entities within their jurisdiction to be subject to measures imposed through Security Council resolution 883 (1993)." It therefore offered its advice to the States and indicated, at the same time, that:

"– Entities in which the Government or public authorities of Libya, or any Libyan undertaking as defined in Security Council resolution 883 (1993), is a majority shareholder, should be considered to be Libyan entities subject to the assets freeze (paras. 3 and 4);

– Entities in which the Government or public authorities of Libya, or any Libyan undertaking as defined in the resolution, is a minority shareholder, but exercises effective control, may be considered a Libyan entity subject to the assets freeze (paras. 3 and 4) of the resolution."[21]

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[17] Cf. Christian Dominicé, *La notion du caractère ennemi des biens privés dans la guerre sur terre* (Genève, 1961), p. 55 et seq., 66-68 et seq., 98 et seq.

[18] See L. Caflisch, op. cit., p. 125.

[19] Para. 3 of the resolution; it further stipulates that, for its purposes, "Libyan undertaking ... means any commercial, industrial or public utility undertaking which is owned or controlled, directly or indirectly, by:

(i) the Government or public utilities of Libya,

(ii) any entity, wherever located or organized, owned or controlled by (i), or

(iii) any person identified by States as acting on behalf of (i) or (ii) for the purposes of this resolution".

[20] The mandate of the Committee is defined in para. 9 of Security Council resolution 748 (1992) and paras. 9 and 10 of Council resolution 883 (1993).

[21] The Committee further stated that "[s]uch cases must be examined on a case-by-case basis, taking into account, *inter alia*:

– The extent of Libyan ownership of the entity;

– The spread of ownership of the remaining shares, in particular, if Libyan persons or entities constitute the single largest block of shareholders, and other shareholding is diffuse;

– Representation of the Libyan Government and other Libyan undertakings on the board, or in the management of the entity and their capability to name directors or managers or otherwise influence business decisions. See "New consolidated guidelines of the Committee for the conduct of its work" (internal document), para. 7.

17. The question arises, however, as to whether the determination of "Libyan entities" may be considered as equal to the determination of their "Libyan nationality". While both notions may to a certain extent overlap, they are not interchangeable.[22]

18. Owing to their character (embargo), the measures against Yugoslavia adopted by the Security Council in its resolution 757 (1992) of 30 May 1992 prohibited supplies or remitting of funds to "any commercial, industrial or public utility undertaking in the Federal Republic of Yugoslavia (Serbia and Montenegro)"or "persons or bodies within the Federal Republic of Yugoslavia"[23] irrespective of their nationality. On the other hand, the resolution obliged the States to prohibit such dealing by their "nationals"[24] or from their territories. This language has been used also in Security Council resolution 1160 (1998) of 31 March 1998 on Kosovo.[25]

* * *

19. The questions raised in the second report and summarized in the previous paragraphs do not represent the core issues of the present topic. They are, however, intrinsic to any analysis of the problem of the impact of the succession of States on the nationality of legal persons. Their discussion under the present topic, therefore, cannot be avoided.

20. In his first report, the Special Rapporteur wondered whether the study of problems of the nationality of legal persons had the same degree of urgency as the study of problems concerning the nationality of natural persons.[26]

21. Some members of the Commission were of the view that the question deserved prompt consideration. They stressed that rules concerning the nationality of legal persons might be more common in State practice and customary law, thus lending themselves more easily to systematization, in contrast to the striking absence of specific provisions on the nationality of natural persons in the context of State succession in the legislation of the majority of States.

22. The majority of members of the Commission took the view that the question of the nationality of legal persons was highly specific. They therefore suggested that it should only be considered after the completion of the work on the nationality of natural persons.[27]

23. The Working Group established at the forty-seventh session of the Commission did not examine the question of the nationality of legal persons because of the laconic character of the relevant paragraphs of the first report devoted to the problem. However, it considered it necessary to underline that the lack of progress on this part of the topic should not be interpreted as reflecting unawareness of the importance of the question on its part.[28] In his second report, the Special Rapporteur suggested that, in order to provide some guidance for the future work of the Commission on this part of the topic, the Working Group should devote some time, during the forty-eighth session of the Commission, to the consideration of the problems mentioned in section A of chapter III of his second report. The Working Group, however, spent its time mainly on the problems of the nationality of natural persons and did not have time to consider legal persons.

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[22] The same resolution, on the other hand, uses the concept of nationality in order to define subjects of States other than Libya, affected by the obligation under the resolution (see paras. 3, 5 and 6).

[23] Security Council resolution 757 (1992), para. 5.

[24] Ibid., paras. 4 (b) and (c), 5 and 7 (b).

[25] Para. 8 of the resolution.

[26] A/CN.4467, para. 50.

[27] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 205.

[28] See also the comments of the Special Rapporteur, ibid., para. 200.

24. Taking into account that, during its fifty-first session in 1999, the Commission might be able to complete the second reading – and consequently its work – on the nationality of natural persons, the Special Rapporteur considers that, during its fiftieth session, the Commission might wish to request the Working Group to devote some time to the study of the problem of the nationality of legal persons in relation to the succession of States. The Working Group could, in particular, discuss the general orientation to be given to the work on this part of the topic and identify the issues on which the Commission might encourage the Governments to concentrate when submitting their comments and observations in accordance with paragraph 5 of General Assembly resolution 52/156. The work of the Working Group would have a purely "preparatory" character and would in no way prejudice the recommendation that the Commission will address to the General Assembly concerning this part of the topic, when it concludes its work on the nationality of natural persons.

B. Views expressed in the Sixth Committee during the fiftieth to fifty-second sessions of the General Assembly concerning the nationality of legal persons

25. During the fiftieth and fifty-first sessions of the General Assembly, several representatives in the Sixth Committee associated themselves with the view of the Commission that, despite the analogy between the nationality of natural persons and that of legal persons, the latter was particularly distinct from the former.

26. According to some representatives, this subject was important in practical terms and interesting from the legal standpoint. It was also observed that, contrary to the situation of natural persons who could, through a change of nationality, be affected in the exercise of fundamental civil and political rights and, to a certain extent, of economic and social rights, State succession had mainly economic or administrative consequences for legal persons.[29]

27. The point was also made that, because the practice of States with regard to the nationality of legal persons presented many common elements, the issue offered more fertile ground for codification in the traditional sense than that of the nationality of natural persons.[30]

28. During the fifty-second session of the General Assembly, some delegations in the Sixth Committee stressed once again the importance of the Commission's future work on the nationality of legal persons in relation to the succession of States. It was observed, in particular, that the nationality of legal persons might also have consequences for individual's property rights.[31]

C. Written comments by Governments

29. There have thus far been no written observations by Governments in response to the request contained in paragraph 5 of General Assembly resolution 52/156.

[29] A/CN.4/472/Add.1, para. 11.

[30] Ibid., para. 12.

[31] Topical summary of the discussion held in the Sixth Committee of the General Assembly during the fifty-second session, prepared by the Secretariat (A/CN.4/483), para. 59.

III. Orientation to be given to the work on this part of the topic

30. Before the Commission takes a decision on how to proceed with the question of the nationality of legal persons, it should re-establish a Working Group. The task of the Working Group should be to consider any possible approach to this part of the topic. Such a preliminary examination would facilitate a decision by the Commission. The present chapter offers several issues for consideration by the Working Group.

A. Should the nationality of legal persons be considered only in the context of the succession of States?

31. From the title of the topic, it appears that the Commission has not set for itself the task of considering the problem of the nationality of legal persons as such. It has limited the problem to the effect on the nationality of legal persons in case of succession of States. Such succession affects certain elements that are used as criteria for determining the nationality of a legal person and, accordingly, may lead to the change of its nationality.

32. It has to be recalled that, contrary to the question of the nationality of natural persons, which the Commission addressed to some extent first when it considered the problem of statelessness[32] and then in relation to the succession of States, the problem of the nationality of legal persons as such has never been studied by the Commission. The Commission should therefore consider the possibility of expanding the study of the second part of the topic, i.e., the question of the nationality of legal persons, beyond succession of States. The risk of such an enlargement of the present topic would be the possible overlapping with the topic of diplomatic protection.

B. Should the study be limited to the problems of the impact of the succession of States on the nationality of legal persons in international law?

33. Should the Commission prefer to keep the study of the question of the nationality of legal persons limited to the situation of the succession of States, one of the first questions to be answered would be whether legal persons are affected – as to their existence – by the succession of States.

34. There are many reasons to believe that, regardless of the succession of States, the legal personality of legal persons continues to exist. Despite the fact that they are creations of the law of the State which itself may cease to exist, they would not disappear together with such State or its legal order.[33] What may be affected, however, is their legal status, including the nationality.

35. But unless the predecessor State ceases to exist, it is not obvious which legal persons are those whose status is so affected. On the basis of what criteria are they defined and

[32] For the history of the Commission's work on nationality, see A/CN.4/467, paras. 8-12; see also *The Work of the International Law Commission*, 5th ed. (United Nations publication, Sales No. E.95.V.6), pp. 41-44.

[33] The Special Rapporteur shares the view according to which the legal offer of the new State has "original" character, even if its content is mostly identical with the legal order of the predecessor State.

distinguished from those legal persons whose nationality remains unaffected? Does it depend on the location of their seat in one of the States concerned? Or is it due to the fact that they have been "registered" with the authorities which are now located in one of the States concerned? Or, still, is it due to the fact that the majority of shareholders have become nationals of one of the States concerned? In the event of the succession of States, one or more States concerned, i.e. two or more successor States, or a predecessor and a successor State, may consider a legal person that was, on the date of the succession of States, a national of the predecessor State as their national. But it may also occur that a legal person is not considered by either of these States as its national. As in the case of individuals, the succession of States can give rise to conflicts that are negative (statelessness) or positive (dual nationality or multiple nationality), and these problems are not merely academic.[34]

36. The effects of the succession of States on the nationality of legal persons may be seen in the legislation of the States concerned, that is, the predecessor or successor States. The activities of the legal person, after the date of the succession of States, may be governed by the laws and provisions applicable to "foreign" legal persons, although prior to the succession of States, under the laws and regulations of the predecessor State, such legal persons have not been treated as "foreign" legal persons. This kind of distinction between legal persons may occur even if the concept of "nationality" of legal persons is not expressly defined by the legislation of the State concerned.

37. During the debate in the Commission, the view was expressed that, although certain legal systems do not regulate the nationality of corporations, international law attributes a nationality to those legal persons for its own purposes, and that such nationality can be affected by State succession.[35]

38. It is generally accepted that, as in the case of natural persons, international law imposes certain limits on the right of a State to bestow its nationality on legal persons. As one author stresses: "[The State] may do so only if the corporation is either established under its law, or has its seat, centre of management or exploitation there, or is controlled by shareholders who are nationals of the State concerned."[36] It may be assumed that similar limitations apply also in the event of a succession of States. There are undoubtedly also some presumptions on which the determination of the nationality of legal persons may be based. These questions should, in the Special Rapporteur's view, be in the centre of the Commission's interest.

C. Which categories of "legal persons" should the Commission consider?

39. Contrary to natural persons, legal persons can assume various forms. The attempt to cover all such forms or categories of legal persons could make the whole exercise abortive. The Commission should define the type of legal persons on which it will focus.

40. Some authors underline the difference between two types of commercial corporations: those which have been incorporated *intuitu personae* and which are deemed to be primarily associations of individuals (*sociétés de personnes*), and those which have been established

[34] L. Caflisch, op. cit., pp. 150-151. This author notes, on the one hand, that "while cases of statelessness may arise, they are actually rare". On the other hand, he concludes that "the theory of international private law generally allows that a company can have two or more nationalities ... In order to resolve positive conflicts of nationality, State courts will give preference, as in the case of individuals, to the nationality which is the most effective".

[35] See the statement by Mr. Crawford (A/CN.4/SR.2388).

[36] Seidl-Hohenveldern, op. cit., p. 8; see also the same author in *Völkerrecht* (5th ed., 1984), p. 280.

intuitu pecuniae and for which capital is a significant consideration (*sociétés de capitaux*). The latter have a more distinct legal personality than the former.[37]

41. From another perspective, a distinction is often drawn between private corporations and State-owned corporations.

42. But there may be still other types of legal persons. During its previous work on other topics the Commission, when considering the notion of the "State", concluded that:

> "the Government is often composed of State organs and departments or ministries that act on its behalf. Such organs of State and departments can be, and often are, constituted as *separate legal entities* within the internal legal system of the State. Lacking as they do international legal personality as a sovereign entity, they could nevertheless represent the State or act on behalf of the central Government of the State, which they in fact constitute integral parts thereof."[38]

43. Similarly, the United States Foreign Sovereign Immunities Act of 1976[39] defines "agency or instrumentality of a foreign State" as an entity "(1) which is a separate legal person, (2) which is an organ of a foreign State or political division thereof, or a majority of whose shares or other ownership interest is owned by a foreign State or political subdivision thereof, and (3) which is neither a citizen or a State of the United States as defined in section 1332 (c) and (d) of this title nor created under the laws of any third country."

44. Transnational corporations constitute yet another category of legal persons.[40]

45. The Commission should consider on which type of legal persons should its study focus. To cover all types of legal persons might be a difficult and even useless task.

D. To which legal relations should the study be limited?

46. It has been stressed during previous debates in the Commission that, unlike natural persons, legal persons do not necessarily have the same nationality in all their legal relations.[41] The Commission should therefore decide to which legal relations the study should be limited.

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[37] L. Caflisch, op. cit., p. 119, note 1. According to this author, "the term commercial corporations means groups of persons incorporated in accordance with the law who have a profit-making goal and aim to carry out commercial or industrial activity under private law". Ibid.

[38] Draft articles on jurisdictional immunities of States and their property, commentary to article 2, para. (10), *Yearbook of the International Law Commission 1991*, vol. II (Part Two), p. 15.

[39] United States Code, 1982 Edition, vol. 12, title 28, chap. 97, section 1603 (b); (text reproduced in United Nations, *Materials on Jurisdictional Immunities of States and their property* (United Nations publication, Sales No. E/F.81.V.10), pp. 55 et seq.

[40] During earlier discussions, e.g., one view was expressed that inasmuch as multinational corporations had the means to take care of their own interests this question did not need to be dealt with by the Commission. *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 179.

[41] See the statement by Mr. Tomuschat (A/CN.4/SR.2387); in the same vein see also G. Kegel, *Internazionales Privatrecht*, 7th ed. (Munich, 1995), p. 413.

E. Should the study concentrate on the "nationality" or rather on the "status" of legal persons in relation to the succession of States or, eventually, cover also other questions related to activities of such legal persons?

47. Peace treaties concluded after the First World War contained special provisions concerning the nationality of legal persons.[42] Some treaties covered a broader spectrum of problems concerning legal persons.[43] Some treaties seem to be concerned rather with the recognition of the legal status and rights attached to it than with the nationality of legal persons. Thus, e.g., the Agreement between India and France for the settlement of the question of the future of the French Establishments in India of 21 October 1954 provided that: "The Government of India agrees to recognize as legal corporate bodies, with all due rights attached to such a qualification,".[44]

48. If the Commission decides to retain the existing limitation of the topic to the succession of States, it should consider, to go beyond the study of nationality to include the status of legal persons and conditions of their operations following succession of States. By the "status" of legal persons the Special Rapporteur understands, in addition to the nationality, rights and obligations inherent to the legal capacity of the legal person, including those determining the type of a legal person.

F. What could be the possible outcome of the work of the Commission on this part of the topic?

49. As in the case of the nationality of individuals, the Commission should consider also the question of the possible outcome of its work on this part of the topic and the form it could take. The consideration of this problem, however, would be at present time premature.

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[42] Thus, e.g., according to article 54, para. 3, of the Treaty of Versailles: "Such juridical persons will also have the status of Alsace-Lorrainers as shall have been recognized as possessing this quality, whether by the French administrative authorities or by a judicial decision." *Materials on succession of States, in respect of matters other than treaties* (United Nations publication, Sales No. E/F.77.V.9), p. 22. Similarly, according to article 75 of the Treaty of Saint-Germain-en-Laye: "Juridical persons established in the territories transferred to Italy shall be considered Italian if they are recognized as such either by the Italian administrative authorities or by an Italian judicial decision." Ibid., p. 496.

[43] E.g., article 75, paragraph 1, of the Treaty of Versailles provided that:

> "Notwithstanding the stipulations of section V of part X (Economic clauses) of the present Treaty, all contracts made before the date of the promulgation in Alsace-Lorraine of the French decree of 30 November 1918 between Alsace-Lorraines (whether individuals or juridical persons) or others resident in Alsace-Lorraine on the one part, and the German empire or German States and their nationals resident in Germany on the other part, the execution of which has been suspended by the armistice or by subsequent French legislation, shall be maintained." (ibid., p. 25)

The Convention relating to Manufacture and Transport Undertakings, forming Annex C to the Commercial Convention between Austria and Poland of 25 September 1922 (League of Nations, *Treaty Series*, vol. LIX, p. 307) granted Austrian companies which had undertakings in the territories ceded to Poland the right to transfer their seat of business and register their statutes in Poland; similarly, the Agreement regarding Companies, concluded on 16 July 1923 between Austria and Italy (ibid., vol. XXVI, p. 383) granted Italy the right to request that companies engaged in production or transport in territory ceded to Italy should transfer their headquarters to the territory of the Kingdom of Italy, register in Italy and remove their names from the Austrian commercial registers.

[44] *Materials on succession of States* ..., p. 81.

IV. Conclusion

50. As has been mentioned above (para. 3), the General Assembly during its regular fifty-second session once again invited Governments to submit comments on the practical problems raised by succession of States affecting the nationality of legal persons in order to assist the Commission in deciding on its future work on this portion of the topic.[45] No such comments have been received by the Special Rapporteur thus far. The views of the Governments are, however, of particular importance at the current stage of work on this part of the topic.

51. In order to encourage comments by Governments, the Commission might wish to indicate in its report more precisely those "specific issues ... on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest in providing effective guidance for the Commission in its further work".[46]

52. In addition to the questions that the Working Group could suggest to the Commission for inclusion in its report, in order to ascertain the views of Governments on issues discussed in chapter III, it would also be useful to encourage States to describe briefly their practice in this field, by requesting States having the experience with the succession of States to indicate how the nationality of legal persons was determined, what kind of treatment was granted to the legal persons which, as a result of the succession of States, became "foreign" legal persons, etc.

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[45] General Assembly resolution 52/156, para. 5.

[46] Ibid., para. 12.

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First report on State responsibility

by Mr. James Crawford, Special Rapporteur

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Introduction

A. Outline of the work of the Commission on State responsibility

1. The subject of State responsibility was one of the 14 topics originally selected by the Commission for "codification and progressive development" in 1949.[1] Work began in 1956 under Mr. Garcia-Amador as Special Rapporteur. It focused on State responsibility for injuries to aliens and their property, that is to say on the content of the substantive rules of international law in that field. Although Mr. Garcia-Amador submitted six reports between 1956 and 1961, the Commission barely discussed them, because of the demands of other topics, including diplomatic immunities and the law of treaties. It was also felt that the disagreements over the scope and content of the substantive rules relating to the protection of aliens and their property were such that little progress was likely to be made.

2. Thus the Commission reconsidered its approach to the topic. In 1962, an intersessional subcommittee, chaired by Mr. Roberto Ago, recommended that the Commission should focus on "the definition of the general rules governing the international responsibility of the State".[2] It added that, in doing so,

> "there would be no question of neglecting the experience and material gathered in special sectors, specially that of responsibility for injuries to the person or property of aliens; and, secondly, that careful attention should be paid to the possible repercussions which new developments in international law may have had on responsibility."[3]

In 1963, the Commission approved the proposed definition and appointed Mr. Ago Special Rapporteur.

3. Between 1969 and 1980, Mr. Ago produced eight reports, together with a substantial addendum to the eighth report, produced after his election to the International Court of Justice. During that time, the Commission provisionally adopted 35 articles, together making up part one of the proposed draft articles ("Origin of State responsibility").

4. In 1979, following the election of Mr. Ago to the International Court, Mr. Willem Riphagen was appointed Special Rapporteur. Between 1980 and 1986, he presented seven reports, containing a complete set of draft articles on part two ("Content, forms and degrees of international responsibility") and part three ("Settlement of disputes") together with commentaries. Owing to the priority given to other topics, however, only five draft articles from part two were provisionally adopted during this period.

5. In 1987, Mr. Riphagen being no longer a member of the Commission, Mr. Gaetano Arangio-Ruiz was appointed Special Rapporteur. In the period 1988-1995, he presented seven reports. The Drafting Committee dealt with the remainder of parts two and three in the quinquennium 1992-1996, enabling the Commission to adopt the text with commentaries on first reading. No attempt was made, however, to reconsider any issues raised by part one of the draft articles. The coordination of articles in the different parts was left to the second reading.

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[1] *Yearbook of the International Law Commission, 1949*, p. 281.

[2] *Yearbook ... 1963*, vol. II (Part One), document A/CN.4/152, p. 228, para. 5.

[3] Ibid.

6. At its forty-ninth session in 1997 (Mr. Arangio-Ruiz having ceased to be a member), the Commission adopted a provisional timetable which envisaged a two-track process, with the aim of completing the second reading by the end of the quinquennium, i.e. by 2001. This process would involve reports by a Special Rapporteur, together with a series of working groups to consider major unresolved issues. Three such issues were tentatively identified as requiring special consideration: international crimes, the regime of countermeasures and the settlement of disputes.[4]

B. Scope of the present report

7. The present report deals first, in the introduction, with a number of preliminary and general issues as to the scope and form of the draft articles. Chapter I[5] discusses what has so far proved the most controversial aspect of the draft articles as a whole: the distinction drawn in article 19 between international crimes and international delicts. This is perhaps the most striking way in which the draft articles sought to deal with "the possible repercussions which new developments in international law may have had on responsibility" (see para. 2 above). Chapter II[5] undertakes the task of reviewing and, where necessary, revising the draft articles in part one (other than article 19). It makes specific proposals, taking into account the comments of States and developments in doctrine and practice since the adoption of part one.

C. Comments received so far on the draft articles

8. Before turning to the substance, a word should be said about comments of Governments on the draft articles. A few written comments were received on part one in the period 1980-1988.[6] More recently, the General Assembly invited comments on the draft articles as a whole. Eighteen Governments have so far responded. [7]Many Governments have also commented on the evolution of particular draft articles in the course of the debate in the Sixth Committee on the work of the Commission, and these comments will also, as far as possible, be taken into account. The Special Rapporteur would welcome further comments both on the draft articles and on the proposals contained in the present report.[8]

9. Comments of Governments so far fall essentially into two categories. The first consists of comments on the draft articles as a whole, with observations on the overall economy of the text, or proposing the deletion of certain topics or issues, or, less often, the inclusion of new topics. These raise a number of general issues, some of which are discussed below. The second group includes comments on particular issues. They will be dealt with as necessary in the discussion of the relevant draft articles.

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[4] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10, paras. 30 and 161).

[5] Chapters I and II will appear as addenda to the present document.

[6] See *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/328 and Add.1-4; *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1-4; *Yearbook ... 1982*, vol. II (Part One), document A/CN.4/351 and Add.1-3; *Yearbook ... 1983*, vol. II (Part One), document A/CN.4/362; and *Yearbook ... 1988*, vol. II (Part One), document A/CN.4/414.

[7] See A/CN.4/488 and Add.1-2.

[8] In addition several non-governmental bodies are contributing comments, including the International Law Association (which is establishing a working group), a panel of Japanese scholars nominated by the Japanese Government and a panel of the American Society of International Law.

D. Some general issues

10. A number of comments discuss the balance between codification and progressive development in the draft articles. This is an important and perennial issue for the Commission. But one difficulty is that discussions in these terms tend to be rather impressionistic and risk substituting debate about generalities for attention to the particular provisions. At the current stage it is sufficient to note the suggestion made (e.g. by France, and impliedly by the United States of America and the United Kingdom of Great Britain and Northern Ireland) that the draft articles err on the side of "progressive development", in a way that is likely to be counter-productive and unacceptable to States.[9] Other comments take a more positive line (e.g. Italy, Uzbekistan, Czech Republic, Argentina, Nordic countries). But the overall balance of the draft articles can only be assessed after the second reading process is further advanced.

11. Certain general issues do warrant some discussion at this stage. They are:

(a) The distinction between "primary" and "secondary" rules of State responsibility;

(b) Issues excluded from the draft articles or insufficiently developed;

(c) The relationship between the draft articles and other rules of international law;

(d) The inclusion of detailed provisions on countermeasures and dispute settlement;

(e) The eventual form of the draft articles.

1. Distinction between "primary" and "secondary" rules of State responsibility

12. As noted above, the Commission initially approached the subject by considering the substantive law of diplomatic protection (protection of the persons and property of aliens abroad). But it became clear that this area was not ripe for codification. A decision to return to certain aspects of the topic, under the rubric of "Diplomatic protection", was only made in 1997; at the same time it was decided to focus largely on the secondary rules applicable to that topic.[10] The issue of potential overlap with the draft articles on State responsibility will need to be kept under review.

13. When it reconsidered the issue in 1962-1963, the Commission saw the present topic as concerning "the definition of the general rules governing the international responsibility of the State", by which was meant responsibility for wrongful acts. The emphasis was on the word "general". The draft articles were to concern themselves with the *framework* for State responsibility, irrespective of the content of the substantive rule breached in any given case. The distinction between "primary" and "secondary" rules was formulated by Special Rapporteur Ago as follows:

> "The Commission agreed on the need to concentrate its study on the determination of the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility. Consideration of the various kinds of obligations placed on States in international law and, in particular, a grading of such obligations according to their importance to the international community, may have to be treated

[9] See A/CN.4/488, part II (Comments and observations received from Governments), "General remarks", comments by France, sixth and seventh paragraphs.

[10] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), paras. 30, 158-161.

as a necessary element in assessing the gravity of an internationally wrongful act and as a criterion for determining the consequences it should have. But this must not obscure the essential fact that it is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequence of the violation. Only the second aspect of the matter comes within the sphere of responsibility proper; to encourage any confusion on this point would be to raise an obstacle which might once again frustrate the hope of a successful codification of the topic."[11]

14. The distinction between primary and secondary rules has had its critics. It has been said, for example, that the "secondary" rules are mere abstractions, of no practical use; that the assumption of generally applicable secondary rules overlooks the possibility that particular substantive rules, or substantive rules within a particular field of international law, may generate their own specific secondary rules, and that the draft articles themselves fail to apply the distinction consistently, thereby demonstrating its artificiality.

15. On the other hand, to abandon the distinction, at the current stage of the work on the topic, and to search for some different principle of organization for the draft articles, would be extremely difficult. It would amount to going back to the drawing board, producing substantial further delays in the work. Moreover, it is far from clear what other principle of organization might be adopted, once the approach of selecting particular substantive areas for codification (such as injury to aliens) has been abandoned. The point is that the substantive rules of international law, breach of which may give rise to State responsibility, are innumerable. They include substantive rules contained in treaties as well as in general international law. Given rapid and continuous developments in both custom and treaty, the corpus of primary rules is, practically speaking, beyond the reach of codification, even if that were desirable in principle.

16. Indeed the distinction has a number of advantages. It allows some general rules of responsibility to be restated and developed without having to resolve a myriad of issues about the content or application of particular rules, the breach of which may give rise to responsibility. For example, there has been an extensive debate about whether State responsibility can exist in the absence of damage or injury to another State or States. If by damage or injury is meant economically assessable damages, the answer is clearly that this is not always necessary. On the other hand in some situations there is no legal injury to another State unless it has suffered material harm.[12] The position varies, depending on the substantive or primary rule in question. It is only necessary for the draft articles to be drafted in such a way as to allow for the various possibilities, depending on the applicable primary rule. A similar analysis would apply to the question whether some "mental element" or *culpa* is required to engage the responsibility of a State, or whether State responsibility is "strict" or even "absolute", or depends upon "due diligence".

17. There remains a question whether the draft articles are sufficiently responsive to the impact that particular primary rules may have. The regime of State responsibility is, after all, not only general but also residual. The issue arises particularly in relation to article 37 of part two ("*Lex specialis*"). It is discussed below.

18. Finally, there is a question whether some of the articles do not go beyond the statement of secondary rules to lay down particular primary rules. This is true, at least apparently, for the definition of "international crimes" in article 19, and especially paragraph 3. Article

[11] *Yearbook ... 1970*, vol. II (Part Two), p. 306, para. 66 (c).

[12] See, e.g., *Lake Lanoux Arbitration, United Nations Reports of International Arbitral Awards*, vol. 12 (1956), p. 281.

19, however, raises broader issues, which are discussed in Chapter I below. Another article which, it has been suggested, infringes the distinction between primary and secondary rules is article 35, dealing with compensation in cases where the responsibility of a particular State is precluded by one of the circumstances dealt with in articles 29 to 34.[13] On the other hand article 35 is a without prejudice clause, and does not specify the circumstances in which such compensation may be payable. It can be argued that it thereby usefully qualifies the "circumstances precluding wrongfulness" in articles 29 to 34 – although whether it is equally applicable to each of those circumstances is a question to which it will be necessary to return.

2. Issues excluded or insufficiently developed

19. Many of the comments made so far with regard to the scope of the draft articles relate to issues which should be excluded (e.g. international crimes, countermeasures, dispute settlement). But a number of topics have been identified which require further treatment. For example, the provisions dealing with reparation, and especially the payment of interest, have been said to be inadequately developed.[14]

20. Another such issue is obligations *erga omnes*. Since its well-known dictum in the *Barcelona Traction* case,[15] the International Court has repeatedly referred to the notion of obligations *erga omnes*, most recently in its Order of 17 December 1997 on the admissibility of Yugoslavian counter-claims in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (para. 35). The matter is presently dealt with in the definition of "injured State" in article 40, where it is linked to the concept of international crimes.

21. Comments of Governments on obligations *erga omnes* are very varied.

22. France is generally critical of the notion, while not denying that in special circumstances a State may suffer legal injury merely by reason of the breach of a commitment. However, it says that "in the case of a commitment under a multilateral treaty, the supposedly injured State must establish that it has suffered special material or moral damage other than that resulting from a simple violation of a legal rule."[16] This may appear to deny the possibility of obligations *erga omnes*, whose very effect, presumably, is to establish a legal interest of all States in compliance with certain norms.

23. Germany, by contrast, sees in the clarification and elaboration of the concepts of obligations *erga omnes* and *jus cogens*, in the field of State responsibility, a solution to the vexed problems presented by article 19.[17]

24. The United States takes an intermediate position, supporting the clarification and in some respects the narrowing of the categories of "injured State" in article 40, especially in relation to breaches of multilateral treaties, while accepting the notion of a general or community interest in relation to defined categories of treaty (e.g. human rights treaties). But it denies that injured States acting in the context of obligations *erga omnes* (or of an *actio popularis*) should have the right to claim reparation as distinct from cessation.[18]

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[13] See, e.g., A/CN.4/488, part II, article 35, comments by France.

[14] See, e.g., ibid., comments by the United States under article 3; fifth paragraph of the comments by France under "General remarks"; comments by Mongolia, under article 45.

[15] *I.C.J. Reports 1970*, at p. 32.

[16] A/CN.4/488, third paragraph of the comments by France under article 40.

[17] Ibid., comments by Germany under part two, chapter IV.

[18] Ibid., comments by the United States under article 19.

25. The United Kingdom likewise raises issues of the definition of "injured State" in the context of multilateral treaty obligations. In particular it questions the consistency of article 40, paragraph 2 (e) (ii), with article 60, paragraph 2 (c), of the Vienna Convention on the Law of Treaties, which allows the parties to multilateral treaties to suspend the operation of the treaty in relation to a defaulting State only if the treaty is of such a character that a material breach of its provisions by one party "radically changes the position of every party with respect to the further performance of its obligations under the treaty".[19]

26. These and related questions will be referred to in Chapter I of the present report, in the context of international crimes, and (depending on the decisions to be taken by the Commission as to the treatment of international crimes) they will be considered in more detail in relation to part two of the draft articles, and especially article 40.

3. Relationship between the draft articles and other rules of international law

27. This issue has already been referred to in the context of the distinction between primary and secondary rules. It is addressed in the introductory articles to part two, in particular articles 37 to 39. Of particular significance is article 37 ("*Lex specialis*"), which recognizes that States are normally free to regulate issues of responsibility arising between them by special rules, or even by "self-contained regimes", notwithstanding the general law of responsibility. A number of Governments have suggested that the *lex specialis* principle should be applied to part one as well.[20] In the Special Rapporteur's view, this suggestion has much to commend it. But there remains a question whether the relocation of article 37 would be sufficient to cope with the implications of "soft" obligations, e.g. obligations to consult or to report. This will be discussed when considering draft articles 37 and 38.

4. Inclusion of detailed provisions on countermeasures and dispute settlement

28. Apart from the question of international crimes, there is controversy about the inclusion of two other major elements in the draft articles, countermeasures and dispute settlement.

29. A number of Governments are strongly critical of the inclusion of detailed rules on countermeasures in the draft articles, although again there is a spectrum of views.

30. Some Governments accept the need for the inclusion of countermeasures as a circumstance precluding responsibility, at least as against the wrongdoing State (article 30), but deny that the detailed elaboration of a regime of countermeasures in part two is appropriate.[21]

31. Others accept that countermeasures should figure in the draft articles not only in article 30, but also in more elaborate form in part two. In some cases, however, they raise questions about the formulation of relevant articles, including questions of a fundamental kind.[22]

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[19] Ibid., comments by the United Kingdom under article 40, para. 2.

[20] Ibid., comments by Germany under "General remarks", comments by the United States under article 30; and comments by France under article 37.

[21] Ibid., comments by France under part two, chapter III; and comments by the United Kingdom, under article 30.

[22] Ibid., comments by the United States under article 30, and under part two, chapter III; comments by Germany under part two, chapter III; comments by Mongolia under part two, chapter III; comments by the Czech Republic under part two, chapter III, and under article 48; comments by Austria under part two, chapter III, and under article 48, para. 1; comments by Ireland under part two, chapter III; and comment by the Nordic countries under part two, chapter III. See also the detailed suggestions made in the alternative by France, under part two, chapter III, and article 48.

32. By contrast, a few regard countermeasures as outside the scope of the draft articles entirely, on the basis that they cannot excuse unlawful conduct and that they tend to exacerbate rather than prevent interstate disputes.[23]

33. A range of views is also expressed in relation to the issues of dispute settlement raised by part three. Of particular significance is the point that most disputes between States (including even some territorial disputes) can be presented as disputes about State responsibility. Any compulsory system of dispute settlement under the draft articles potentially becomes a general dispute settlement mechanism for inter-State disputes. No doubt preference can be given to any other third-party mechanism which the parties may have chosen. But except in specialized fields, there is no such mechanism for most States in most cases. Some Governments (e.g. Mexico, Italy, Mongolia) regard this as a reason for supporting and even strengthening part three. Others (e.g. United States, France) regard it as a reason for deleting it. Still others welcome some provision for dispute settlement but urge caution in its formulation (e.g. Germany, Czech Republic, Ireland, Nordic countries, Argentina).[24] It should be noted that this issue is intimately linked to the question of the form the draft articles should take, an issue discussed below.

34. A related question is whether the draft articles should incorporate procedural elements, such as references to the onus or standard of proof. In the normal practice of the Commission, such adjectival issues have been avoided, although occasionally a substantive rule is formulated in terms implying that it is to be read narrowly or by way of exception: e.g. the negative formulation in the 1969 Vienna Convention of certain grounds for challenging the validity of or terminating a treaty (see articles 46, 56, 62 (1)).

35. France, while opposing the inclusion of separate, and especially compulsory, provisions for the settlement of disputes, argues in favour of the inclusion of a range of procedural safeguards.[25] *A fortiori*, such presumptions or other safeguards would be in order in a set of articles which did properly include measures for compulsory dispute settlement. They would be of particular significance in relation to international crimes, if that notion is retained. The normal requirement that criminal conduct should be duly and fully proved against the entity in question must presumably apply to States, as it does to any other natural or legal person.

36. The draft articles do include some such provisions. For example, article 8 attributes to a State the conduct of persons acting in fact on its behalf if:

> "(a) *it is established that* such person or group of persons was in fact acting on behalf of that State;" (emphasis added).

37. Article 27 proscribes certain measures of aid or assistance to a wrongdoing State "if *it is established that* [the aid or assistance] is rendered for the commission of an internationally wrongful act carried out by the latter" (emphasis added). It is not clear why this formula is used in these articles and not others. For example, article 16, dealing with "Existence of a breach of an international obligation", is in neutral terms. It provides merely that:

> "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation."

[23] Ibid., comments by Mexico under article 30.

[24] Ibid., comments by the United States, Germany, Mongolia, France, the Czech Republic, Mexico, the United Kingdom and the Nordic countries under part three.

[25] Ibid., comments by France under part three.

38. There is a case for more systematic attention to such issues. This can best be done in the context of the overall issues of dispute resolution, which in turn depend to a great extent upon the eventual form of the draft articles.

5. The eventual form of the draft articles

39. A question of considerable strategic importance is whether the draft articles should be proposed as a convention open to ratification, or whether they should take some other form, e.g. a declaration of principles of State responsibility to be adopted by the General Assembly. The latter approach would have major implications for dispute settlement: a General Assembly resolution could not establish more than a facility for dispute resolution, and would be unlikely even to go that far.

40. The views of Governments so far range widely. Some (e.g. Mexico, Italy, Nordic countries) expressly or by implication favour a convention, since without one substantive provisions for dispute settlement are impossible. Others (e.g. United Kingdom, Austria) advocate a non-conventional form. One argument which is particularly stressed is that the process of subsequent debate and the possible non-adoption or non-ratification of a convention would cast doubt on established legal principles. Some Governments (e.g. United States, Czech Republic, Germany, France, Argentina) take no position at the current stage.[26]

41. The normal working method of the Commission is to prepare its proposals in the form of draft articles, leaving it to the completion of the process to decide what form the text should take. The Special Rapporteur believes that the normal method has much to commend it, and that the case for departing from it has not been made *at the current stage*. Discussion of the eventual form of the draft articles is premature, at a time when their scope and content have not been finally determined. States unhappy with particular aspects of a text will tend to favour the non-conventional form, but the option of a declaration or a resolution should not detract attention from an unsatisfactory text. In other words, deferring consideration of the form of the instrument has the desirable effect of focusing attention on its content. The precedent of the Vienna Convention on the Law of Treaties is instructive. At one stage it was thought that the codification and progressive development of the law of treaties in the form of a treaty rather than a "restatement" was undesirable, and even logically excluded. Yet the Vienna Convention is one of the Commission's most important products, and it seems likely that it has had a more lasting and a more beneficial effect as a multilateral treaty than it could have had, for example, as a resolution or a declaration.

42. For these reasons, in the Special Rapporteur's view the question of the eventual form of the draft articles should be deferred for the time being. There will be occasion to return to it in the context of the treatment of the provisions on dispute settlement, at which stage the eventual scope of the draft articles with respect to such issues as crimes and countermeasures should be clearer.

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[26] Ibid., under "General remarks": sixth to eleventh paras. of comments by Austria; fourth para. of comments by France; last para. of comments by Mexico; sixth to eighth paras. of comments by the United Kingdom; and last para. of comments by the United States.

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First report on State responsibility

by Mr. James Crawford, Special Rapporteur

Addendum

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I. The distinction between "criminal" and "delictual" responsibility

Introduction

43. The single most controversial element in the draft articles on State responsibility is the distinction between international crimes and international delicts. That distinction was first accepted in 1976, when article 19 was provisionally adopted. But its substantive consequences were not finally formulated by the Commission until 1996, and then only after a difficult and fraught debate.[27] There is a marked contrast between the gravity of an international crime of a State, as expressed in article 19, on the one hand, and the rather limited consequences drawn from such a crime in articles 51 to 53, on the other. There is a further contrast between the strong procedural guarantee associated with countermeasures under article 48 and part three, and the complete absence of procedural guarantees associated with international crimes.

44. When article 19 was first adopted, many Governments preferred to reserve their written comments until the definition of an international crime had been completed by the elaboration of specific consequences and procedures. In the debates in the Sixth Committee a majority of States which expressed views in the period 1976-1980 supported the distinction between crime and delict; an even larger majority favoured some distinction being drawn between more and less serious wrongful acts.[28]

45. Following the adoption of parts two and three, all the Governments which have so far commented have dealt with the issue of international crimes. Their comments reveal a wide range of views and include many criticisms and suggestions: they are summarized below. A similarly wide range of views is contained in the extensive literature.[29] It is time to take stock.

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[27] As a result of the decision not to reopen issues raised by part one of the draft articles, the Commission during this period did not reconsider article 19 itself. See the footnote to article 40, cited in para. 51 below. The principal Commission reports dealing with international crimes are: Ago, fifth report, *Yearbook ... 1976*, vol. II (Part One), document A/CN.4/291 and Add.1-2, pp. 24-54; Riphagen, third report, *Yearbook ... 1982*, vol. II (Part One), document A/CN.4/354 and Add.1-2, pp. 48-50; fourth report, *Yearbook ... 1983*, vol. II (Part One), document A/CN.4/366 and Add.1, pp. 10-24; Arangio-Ruiz, seventh report, A/CN.4/469 and Add.2 (1995), eighth report, A/CN.4/476 and Corr.1 (1996).

[28] A careful analysis of the views of the 80 Governments which expressed themselves at that time is contained in M. Spinedi, "International Crimes of State: The Legislative History", in J.H.H. Weiler, A. Cassese and M. Spinedi (eds.), *International Crimes of State* (de Gruyter, Berlin, 1989), pp.45-79.

[29] See the items contained in the bibliography attached to the present report. Among these, Weiler, Cassese and Spinedi (eds.), *International Crimes of State* (1989) is of particular importance. The most persuasive defence of article 19 is A. Pellet, "Vive le crime! Remarques sur les degrés de l'illicite en droit international" in *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* (United Nations, New York, 1997), p. 287. Contrary views expressed by present or past members of the Commission include: R. Rosentock, "An International Criminal Responsibility of States?", ibid., p. 265; D. W. Bowett, "Crimes of State and the 1996 Report of the International Law Commission on State Responsibility" *EJIL, 1998*, p. 163; I. Brownlie, *State Responsibility, System of the Law of Nations, Part I* (Clarendon Press, Oxford, 1983), pp. 32-33; B. Simma, "From Bilateralism to Community Interest in International Law" *Receuil des cours ...*, vol. 250 (1994), pp. 301-321.

A. The treatment of State crimes in the draft articles

46. Article 19, paragraph 1 provides that:

> "1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached."

This is a statement of the obvious. It has sometimes been argued that an international obligation has not been, or could not have been, assumed with respect to a particular subject (e.g., because it is domestic or internal to the State).[30] There appears, however, to be no case where a State has claimed to be exempt from responsibility with respect to an acknowledged international obligation, merely because of the subject matter of that obligation. Nor is there any reported case where an international tribunal has upheld such an argument. No contrary view or authority is cited in the commentary. Article 19, paragraph 1, does no more than express what is clearly implied by articles 1 and 3, and can safely be left to be clarified in the commentaries to those articles.

47. Article 19, paragraph 4 proclaims a distinction between international crimes and international delicts:

> "Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict."

The category of "delict" is thus defined in purely negative terms, in contradistinction to the definition of "international crimes".

48. That definition is contained in article 19, paragraph 2, which defines as "an international crime":

> "[a]n internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole".

The circularity of this definition has often been noted. On the other hand, it is no more circular than the definition of peremptory norms of general international law (*jus cogens*) contained in article 53 of the Vienna Convention on the Law of Treaties of 1969, a definition now widely accepted. But it is possible to define the category of "crimes" in other ways. This might be done, for example, by reference to their distinctive procedural incidents. "Crimes" might be distinguished from "delicts" by reference to the existence of some specific system for investigation and enforcement. Or the distinction might be made by reference to the substantive consequences. Thus "delicts" might be defined as breaches of obligation for which only compensation or restitution is available, as distinct from fines or other sanctions. Article 19, paragraph 2, adopts neither course. And as will be seen, the draft articles nowhere specify any distinctive and exclusive consequence of an "international crime". Nor do they lay down any authoritative procedure for determining that a crime has been committed.

49. Conscious of the difficulties of applying the bare definition contained in article 19, paragraph 2, the Commission sought to clarify the position in paragraph 3. This provides:

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[30] The Permanent Court in an early case pointed out that international obligations could in principle be assumed by States on any subject: see *Nationality Decrees in Tunis and Morocco* (1923) *P.C.I.J. Series B No. 4*, pp. 23-27. The development of international law-making bears out this remark. Cf. *Military and Paramilitary Activities in and Against Nicaragua, I.C.J. Reports 1986*, p. 131.

"3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

(a) A serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) A serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) A serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) A serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas."

Even supporters of the principle underlying article 19 are strongly critical of paragraph 3, and for good reason.[31] First, it is an illusory definition. A crime merely "may result" from one of the enumerated acts. Secondly, it is wholly lacking in specificity. A crime "may" result. but subject to paragraph 2 and to unspecified "rules of international law in force". The problem is not that paragraph 3 only provides an inclusive list; it could hardly do otherwise. It is rather that it provides no assurance that even the breaches enumerated would constitute crimes, if proven. Whether they "may" do so depends, *inter alia*, on "the rules of international law in force". No doubt it was not the function of the draft articles, including article 19, paragraph 3, to restate primary rules, but that is no reason to give the *appearance* of doing so. Thirdly, the various subparagraphs are disparate both in their content and in their relation to existing international law.[32] Having regard to its merely illustrative role and its lack of independent normative content, paragraph 3 should be substituted by a more detailed commentary, if the distinction between crimes and delicts is retained in the draft articles.[33]

50. An analysis of paragraph 3 leads directly back to paragraph 2, but the illustrations offered in paragraph 3 raise a further question. The emphasis in paragraph 2 is on *norms* which are essential for the protection of fundamental interests of the international community, such that the community regards a breach of those norms as constituting a

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[31] See, e.g., Pellet, op. cit. (footnote 29), pp. 298-301.

[32] This can be illustrated, for example, by reference to subpara. (d). Its opening words evidently do not refer to a single "obligation ... for the safeguarding and preservation of the human environment", international law contains a range of environmental norms and cannot be expressed in terms of a single rule. Depending on the circumstances, a large number of rules can be described as safeguarding and preserving the "human environment", a term which also raises issues about its relationship to "the natural environment" or to the environment as a whole. The second clause ("such as") raises further difficulties: (I) the phrase "such as" provides yet a second level of inclusiveness; (ii) the word "those" cannot grammatically refer back to the singular "obligation"; and (iii) general international law does not contain a norm prohibiting "massive" pollution: whether the threshold for the prohibition may be set (and it may be different in different contexts), it is clearly less stringent than "massive" pollution.

[33] It should be noted that the version of article 19 originally proposed by Special Rapporteur Ago was very different: see his fifth report, *Yearbook ... 1976*, vol. II (Part One), document A/CN.4/291 and Add.1-2, p. 54. It was both much broader in its ambit (for example, any breach of Article 2, paragraph 4 of the Charter of the United Nations was designated an "international crime") and more definite in its content. The tentative and qualifying language of article 19, paragraph 3 was added in the Drafting Committee. The original draft is better read as an attempt to express the notion of obligations *erga omnes*, and indeed the term "international crime" was placed in inverted commas. At that stage, of course, no attempt had been made to define the range of States affected or injured by a breach of obligation.

"crime". By contrast, paragraph 3 focuses not on the importance of the norms but on the seriousness of their breach: it is only "serious" breaches that are crimes, in some cases further qualified by such phrases as "on a widespread scale" or "massive". But international law does not contain a norm which prohibits, for example, "widespread" cases of genocide: it simply prohibits genocide. In other words, paragraph 3 adds an additional element of seriousness of breach, independently of the legal definition of the crime itself. It is not unusual for criminal law norms to incorporate a definitional element corresponding to the scale or seriousness of the conduct to be prohibited; but paragraph 3 appears to add yet a further unspecified element of seriousness. Taken together the two paragraphs can be read as saying that if (for example) a case of aggression, or of genocide, is so serious that the international community as a whole stigmatizes that act as criminal, then it is to be accounted a crime. To which it must be objected that this is not a definition of international crimes at all.[34]

51. The consequences of international crimes are dealt with in part two:

- Under article 40, paragraph 3, all other States in the world are defined as "injured States" with respect to an international crime. The corollary is that all States may seek reparation under articles 42 to 46, and may take countermeasures under articles 47 and 48. This is perhaps the single most significant consequence of an international crime. However, it is not a *distinctive* consequence of such crimes, since many or all States may be "injured" by a delict pursuant to articles 40, paragraph 2 (e) or (f), for example by a breach of an obligation under a multilateral treaty or under general international law for the protection of human rights and fundamental freedoms. Article 40, paragraph 2 (e) (iii), does not require that such a breach should have been "serious", or that the obligation should have been "of essential importance";
- Under article 52, certain rather extreme limitations upon the obtaining of restitution or satisfaction do not apply in case of crimes. Thus in the case of crimes an injured State is entitled to insist on restitution even if this seriously and fruitlessly jeopardizes the political independence or economic stability of the "criminal" State;
- Under article 53, there is a limited obligation of solidarity in relation to crimes. For example, States are under an obligation "not to recognize as lawful the situation created" by a crime (article 53 (a)). This may suggest, *a contrario*, that States are entitled to recognize as lawful the situation created by a delict, no matter how serious that delict may be.

By contrast, the draft articles do not provide for "punitive" damages for crimes, let alone fines or other sanctions. Nor do they lay down any special procedure for determining authoritatively whether a crime has been committed, or what consequences should follow: this is left for each individual State to determine *qua* "injured State". Detailed proposals for such a procedure were rejected by the Commission in 1995 and again in 1996;[35] attempts to draft lesser alternative procedures were not accepted.[36] Overall it can be said that the specific consequences attached to international crimes in parts two and three are rather

[34] Cf. *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, P.C.I.J. Series A/B, No. 65 (1935), pp. 52-53.

[35] For the proposals see Arangio Ruiz, seventh report, A/CN.4/469 and Add.2, paras. 70-119, 140-146, eighth report, A/CN.4/476 and Corr.1. For a summary of the debate, see *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), paras. 304-339; ibid., *Fifty-first Session, Supplement No. 10* (A/51/10), chap. III.B, para. 61, and chap. III.D.2, commentary to article 51.

[36] These proposals are briefly described in *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), chap. III.D.2, paras. (7)-(14) of the commentary to article 51.

minimal, at least if the notion of "crimes" reflected in article 19 is to be taken at face value. Indeed this can be implied from a footnote added to article 40, which reads:

> "The term 'crime' is used for consistency with article 19 of part one of the articles. It was, however, noted that alternative phrases such as 'an international wrongful act of a serious nature' or 'an exceptionally serious wrongful act' could be substituted for the term 'crime', thus, *inter alia*, avoiding the penal implication of the term."

This possibility will be discussed in a subsequent section of the present report.

B. Comments of Governments on State crimes

52. A number of Governments which have so far commented in the current round on the draft articles have been critical of the inclusion of State crimes in the draft articles.

- The *United States of America* strongly opposes the provisions dealing with State crimes for which, in its opinion, "there is no support under customary international law and which undermine the effectiveness of the State responsibility regime as a whole". It bases this view on the "institutional redundancy" of the notion of international crimes, given the existing role of the Security Council and its subordinate organs and the proposed international criminal court; the "abstract and vague language" of article 19, paragraph 2; the tendency of article 19 to diminish "the import of and the attention paid to other violations of State responsibility"; its contradiction with the "principle of individual responsibility", and the confusion it tends to produce as between the notion of States' "interest" in compliance with the law generally and their "standing" to protest a particular violation.[37]
- *France* complains that article 19 "gives the unquestionably false impression that the aim is to 'criminalize' public international law", contrary to existing international law which emphasizes reparation and compensation. In the view of the French Government, "State responsibility is neither criminal nor civil" but is *sui generis*. While some wrongful acts are more serious than others, the dichotomy between "crimes" and "delicts" is "vague and ineffective", and "breaks with the tradition of the uniformity of the law of international responsibility". France stresses that "no legislator, judge or police exists at an international level to impute criminal responsibility to States or ensure compliance with any criminal legislation that might be applicable to them. It is hard to see who, in a society of over 180 sovereign States, each entitled to impose punishment, could impose a criminal penalty on holders of sovereignty". By contrast, Security Council measures under Chapter VII of the Charter of the United Nations are not intended to be "punitive"; where they are "coercive" it is because the restoration of international peace and security requires them to be effective.[38]
- *Germany* expresses "considerable scepticism regarding the usefulness of the concept" of international crimes, which are in its view "not sustained by international practice", would tend to weaken the "principle of individual criminal responsibility" and is inconsistent with the principle of the equality of States. In its view, "universally condemned acts can now be expected to find their adequate legal and political response by the community of States" acting through existing institutional means, in particular Chapter VII of the Charter of the United Nations. By contrast with

[37] A/CN.4/488, comments by the United States under article 19 and article 40, para. 3.

[38] Ibid., comments by France under article 19.

international crimes, "the concepts of obligations *erga omnes* and, even stronger, *jus cogens* have a solid basis in international law"; the Commission is encouraged to develop the implications of these ideas in the field of State responsibility.[39]

- The *United Kingdom of Great Britain and Northern Ireland* sees "no basis in customary international law for the concept of international crimes" nor any "clear need for it". Instead it points to what it regards as "a serious risk that the category will become devalued, as cases of greater and lesser wrongs are put together in the same category, or as some wrongs are criminalized while others of equal gravity are not". Moreover the actual consequences attached to international crimes appear to be "of little practical significance and, to the extent that they do have significance, to be unworkable". At a technical level, article 19 is criticized as giving "no coherent account ... of the manner in which the 'international community as a whole' may 'recognize'" international crimes, and of confusing the question of the seriousness of a norm (article 19, paragraph 2) and the gravity of its breach (article 19, paragraph 3).[40]
- *Austria* proposes the deletion of articles 19 and 51 to 53. In its view, "inter-State relations lack the kind of central authority necessary to decide on subjective aspects of wrongful State behaviour". Action should be taken within the framework of Chapter VII of the Charter, or against individuals (including State officials) through the development of organs for the enforcement of international criminal law: these mechanisms "may provide a more effective tool against grave violations of basic norms of international law such as human rights and humanitarian standards than the criminalization of State behaviour as such". On the other hand, the Commission should "concentrate on the regulation of the legal consequences of violations of international law of a particularly grave nature".[41]
- *Ireland* doubts that existing international law recognizes the criminal responsibility of States, as distinct from State responsibility for the criminal acts of individuals. It notes that the well-known dictum of the International Court in the *Barcelona Traction* case supports the notion of obligations *erga omnes*,[42] but suggests that there is a "quantum leap" from that notion to the criminal responsibility of States. Nor does it support the concept of international crimes as a matter of progressive development. To penalize the State is neither feasible nor just, since in many cases it is the people of the State itself who are the principal victims of the crime.[43]
- Switzerland likewise doubts the existence or utility of the distinction between crimes and delicts: indeed it describes the distinction as "an attempt to conceal the ineffectiveness of the conventional rules on State responsibility behind an ideological mask".[44]

53. However, these views are by no means universally shared. The *Czech Republic*, for example, expresses the view that a distinction between more and less serious wrongful acts is "to be found in positive law and in State practice, although ... no doubt in a relatively fragmentary, unsystematic or indirect form". In that regard it refers to the notion of obligations *erga omnes*, the activity of the Security Council under Chapter VII of the Charter

[39] Ibid., comments by Germany under part two, chap. IV.

[40] Ibid., comments by the United Kingdom under article 19.

[41] Ibid., comments by Austria under article 19.

[42] *I.C.J. Reports 1970*, p. 33.

[43] A/CN.4/488, comments by Ireland under article 19.

[44] Ibid., comments by Switzerland under article 19.

and the concept of *jus cogens*. Despite supporting the distinction between crimes and delicts, it affirms that "the law of international responsibility is neither civil nor criminal, and that it is purely and simply international", noting in addition that in some legal systems the term "delict" has an exclusively penal connotation. It therefore proposes adopting more neutral terms, or even making the distinction by other means, e.g. by differentiating more clearly the consequences of wrongful acts depending on whether they affect particular States or the interests of the international community as a whole. "As a result, the terms used in the articles would be neutral but would leave the necessary room for widely acceptable terms to be developed subsequently in the sphere of State practice and doctrine."On the other hand, it points out the difficulties in attaching specific consequences to international crimes of State, which consequences are intimately linked to questions relating to the relevant primary rules.[45]

54. *Mongolia* supports the distinction between crimes and delicts, on condition that the determination of State criminal liability cannot be left to the decision of one State but should be "attributed to the competence of international judicial bodies",[46] which is not the case under the present draft articles.

55. *Uzbekistan* proposes a new version of article 19, paragraph 2, focusing on "internationally wrongful acts of exceptional gravity which pose a threat to international peace and security and also infringe upon other vital foundations of peace and of the free development of States and peoples".[47]

56. *Denmark*, on behalf of the *Nordic countries*, notes that they continue to support the "most spectacular feature of part one", the distinction between international delicts and international crimes. The "systemic" responsibility of States for crimes such as aggression and genocide ought, in their view, to be recognized "in one forum or another be it through punitive damages or measures affecting the dignity of the State". On the other hand, some other less "sensitive" terminology, such as "violations" or "serious violations", might be considered, provided it carries more severe consequences, and that the distinction between the two categories is clear.[48]

57. *Mexico* observes that "there is inadequate differentiation of the terms 'crime' and 'delict' in the draft articles". This appears to be directed as much to the consequences of international crimes, spelt out in part two, as to the definitional issues dealt with in article 19.[49]

58. *Argentina* affirms that "the consequences of an internationally wrongful act cannot be the same where that act impairs the general interests of the international community as where it affects only the particular interests of a State". On the other hand, now that "the international legal order tends to draw a clear distinction between the international responsibility of the State and the international criminal responsibility of individuals, it does not seem advisable to apply to the former a terminology appropriate to the latter". It also calls upon the Commission to "elaborate as precisely as possible the different treatment and the different consequences attaching to different violations".[50]

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[45] Ibid., comments by the Czech Republic under article 19.

[46] Ibid., comments by Mongolia under article 19.

[47] Ibid., comments by Uzbekistan under article 19.

[48] Ibid., comments by the Nordic countries under article 19.

[49] Ibid., comments by Mexico under article 19.

[50] A/CN.4/488/Add.1, comments by Argentina under article 19.

59. *Italy* likewise supports maintaining a distinction between the most serious internationally wrongful acts, of interest to the international community as a whole, and other wrongful acts, but it calls for further development both of the substantive consequences and the procedural incidents of the distinction, within the framework of parts two and three of the draft articles. In its view, once the existence of such a category is accepted, then the consequences of the distinction must be dealt with in the draft articles: " it is precisely in this area that an effort to clarify and, where necessary, integrate existing rules is needed". On the other hand, this special regime of State responsibility has nothing in common with penal sanctions such as those imposed under national criminal laws, and the use of some other term than "international crimes" could perhaps be envisaged.[51]

60. These comments have been summarized in some detail, because they give a full and insightful account of the current debate over international crimes of State. This is true even if the comments so far received cannot necessarily be regarded as representative of the views of the international community as a whole. Clearly, no simple conclusion can be drawn from them. Nonetheless there is a significant degree of support for a number of propositions. They may be summarized as follows:

(i) Article 19 is generally seen as an exercise not of codification but of development. Different views are expressed as to whether the development is "progressive" but few Governments believe that the concept of international crimes has a strong basis in existing law and practice;

(ii) The definition of "international crimes" in articles 19, paragraphs 2 and 3, needs further clarification;

(iii) The consequences drawn from the distinction create difficulties to the extent that they allow for reactions by individual States acting without regard to the position of the international community as a whole;

(iv) There is little or no disagreement with the proposition that "the law of international responsibility is neither civil nor criminal, and that it is purely and simply international".[52] As a corollary, even those Governments which support the retention of article 19 in some form do not support a developed regime of criminal responsibility of States, that is to say, a genuine "penalizing" of the most serious wrongful acts;

(v) Consistent with this view, it is quite widely felt that the terminology of "crimes" of State is potentially misleading. Many comments accept that a distinction should be drawn, along the lines of the *Barcelona Traction* dictum, between the most serious wrongful acts, of interest to the international community as a whole, and wrongful acts which are of concern only to the directly affected States. But this distinction need not and perhaps should not be expressed in the language of "crime" and "delict". Instead, some different terminology should be explored; alternatively the different characteristics of wrongful acts could be more systematically articulated in part two of the draft articles, within the framework of a single generic conception of State responsibility.

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[51] A/CN.4/488/Add.2, comments by Italy under article 19.

[52] This is the view both of France (above, para. 52) and the Czech Republic (above, para. 53), despite their different emphases and conclusions.

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First report on State responsibility

By Mr. James Crawford, Special Rapporteur

Addendum

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I. The distinction between "crimes" and "delictual" responsibility (continued)

C. Existing international law on the criminal responsibility of States

61. The traditional position of international law on the question of international crimes of States was expressed by the Nürnberg Tribunal, which stated that:

> "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[53]

The treaties recognizing or establishing international crimes took the same position. Neither Germany nor Japan were treated as "criminal States" by the instruments creating the post-war war crimes tribunals, although the London Charter of 1945 specifically provided for the condemnation of a "group or organization" as "criminal".[54] The first of the post-war criminal law conventions, the Genocide Convention, specifically provided in article IX for State responsibility with respect to the crime of genocide, a crime characteristically associated with acts of government.[55] Yet it was made clear at the time that article IX did not envisage any form of State criminal responsibility.[56]

62. At the time article 19 was proposed and adopted, there had been no judicial decisions affirming that States could be criminally responsible. The commentary to draft article 19 notes the absence of international judicial or arbitral authority for a distinction between crimes and delicts.[57] It cites as indirect support for such a distinction certain cases on reprisals or countermeasures,[58] and places particular emphasis on the "essential distinction" drawn by the Court in the *Barcelona Traction* case.[59] According to the commentary this passage provides "an important argument in support of the theory that there are two separate regimes of international responsibility depending on the subject matter of the international obligation breached, and consequently that, on the basis of that distinction, there are two different types of internationally wrongful acts of the State".[60]

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[53] *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, vol. 22, p. 466 (1948).

[54] Charter of the International Military Tribunal, London, 8 August 1945, United Nations *Treaty Series*, vol. 82, p. 279, articles 9 and 10, at p. 290. Such a declaration could only be made after a trial of a member of the organization "in connection with any act of which the individual may be convicted", and there were certain procedural safeguards for other members. The Tokyo Charter contained no such provisions. See also the *Touvier* case, International Law Reports, vol. 100 (1992), p. 337, *Jury Classeur Périodique*, 1993 I, 21977.

[55] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations *Treaty Series*, vol. 78, p. 277.

[56] Sir Gerald Fitzmaurice as co-sponsor of article IX stated that "the responsibility envisaged by the joint Belgian and United Kingdom amendment was the international responsibility of States following a violation of the convention. That was civil responsibility, not criminal responsibility": *Official Records of the General Assembly, Sixth Committee, Summary Records*, 21 September-10 December 1948, p. 440.

[57] *Yearbook ... 1976*, vol. II (Part Two), commentary to article 19, para. (8).

[58] Specifically the *Naulilaa* case (1928), *United Nations Reports of International Arbitral Awards*, vol. 2, p. 1025; and the *Cysne* case, ibid., p. 1052: see commentary to article 19, para. (9) in *supra*, note 57. Neither of these cases involved "crimes" as defined in article 19.

[59] *Supra*, note 57, commentary to article 19, para. (10).

[60] Ibid.

63. Judicial decisions since 1976 certainly support the idea that international law contains different kinds of norms, and is not limited to the "classical" idea of bilateral norms. On the other hand there is no support in those decisions for a distinct category of international crimes of States.

(a) In *Velásquez Rodríguez v. Honduras (Compensation)*, the Inter-American Court of Human Rights was asked to award punitive damages in respect of the "disappearance" of a citizen, one of a large number of persons who had been abducted, possibly tortured and almost certainly executed without trial. The breach was an egregious one but the Court nonetheless rejected the claim to punitive damages. Relying in part on the reference to "fair compensation" in article 63, paragraph 1, of the American Convention on Human Rights, the Court asserted that:

> "Although some domestic courts, particularly the Anglo-American, award damages in amounts meant to deter or to serve as an example, this principle is not applicable in international law at this time."[61]

(b) In *Re Letelier and Moffit*, a Chile-United States International Commission was charged to determine the amount of compensation payable to the United States arising from the assassination by Chilean agents in Washington, D.C. of a former Chilean Minister, Orlando Letelier, and another person.[62] The payment was to be made *ex gratia* but was to be assessed "in conformity with the applicable principles of international law, as though liability were established". The Commission assessed damages in accordance with ordinary principles, taking into account moral damage but not punitive damage: in fact no claim for punitive damages was made.[63]

(c) In the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (Preliminary Objections)*, the International Court upheld its jurisdiction to hear a claim of State responsibility for genocide under article IX of the Genocide Convention.[64] The Applicant's primary claim concerned the direct involvement of the respondent State itself, through its high officials, in acts of genocide, although other bases of claim were also alleged. In response to an argument that State responsibility under article IX is limited to responsibility for failure to prevent or punish genocide (as distinct from cases of direct attribution), the Court said:

> "the reference in article IX to the responsibility of a State for genocide or for any of the other acts enumerated in article III does not exclude any form of State responsibility. Nor is the responsibility of a State for acts of its organs excluded by article IV of the Convention, which contemplates the commission of an act of genocide by 'rulers' or 'public officials'."[65]

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[61] IACHR Series C, No. 7 (1989), p. 52; *International Law Reports*, vol. 95, p. 315-316.

[62] *International Law Reports*, vol. 88 (1992), p. 727. The United States courts had earlier awarded US$ 5 million, including $2 million in punitive damages, on account of the incident, in a default judgement which had not been satisfied: *Letelier v Republic of Chile*, 502 F Supp. 259 (1980); *International Law Reports*, vol. 63, p. 378. The Commission awarded approximately $2.6 million in full and final settlement.

[63] In a separate concurring opinion, Commissioner Orrego Vicuña expressed the view that "international law has not accepted the concept of punitive damages", and that any award which was punitive in its effect because the amount was "excessive or disproportionate" would be "equally unwarranted and contrary to international law", in *International Law Reports*, vol. 88, p. 741.

[64] *I. C. J. Reports 1996*, p. 595.

[65] Ibid., p. 616.

The Court's reference to "any form of State responsibility" is not to be read as referring to State criminal responsibility, but rather to the direct attribution of genocide to a State as such.[66] It may be noted that neither party in that case argued that the responsibility in question would be criminal in character.[67]

(d) In *Prosecutor v Blaskic (Objection to the Issue of* Subpoena Duces Tecum), the Appeals Chamber of the International Tribunal for the Former Yugoslavia had to consider, *inter alia*, whether the Tribunal could subpoena evidence directly from States pursuant to its Statute and Rules. The evidence in question related to the alleged commission by State agents, including the accused, of crimes within the jurisdiction of the Tribunal. In other words, it related to alleged crimes imputable to the State. The Appeals Chamber held that no power to issue subpoenas against States existed. It said, *inter alia*:

> "the International Tribunal does not possess any power to take enforcement measures against States. Had the drafters of the Statute intended to vest the International Tribunal with such a power, they would have expressly provided for it. In the case of an international judicial body, this is not a power that can be regarded as inherent in its functions. Under current international law States can only be the subject of countermeasures taken by other States or of sanctions visited upon them by the organized international community, i.e., the United Nations or other intergovernmental organizations. Under present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems."[68]

The qualification in the last sentence ("akin to those provided for in national legal systems") must be noted. Nonetheless the Court held that the Tribunal is not authorized to issue orders termed "subpoenas" to States, although it is clearly authorized by article 29, paragraph 2, of its Statute to issue orders with which States are required to comply.[69]

Other cases which might be cited to similar effect include the various phases of the *Rainbow Warrior* affair.[70]

64. The position in State practice as at 1976 was more complex. The language of "crimes" was used from time to time with respect to the conduct of States in such fields as aggression, genocide, apartheid and the maintenance of colonial domination, and there was concerted condemnation of at least some cases of the unlawful use of force, of systematic

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[66] See, by contrast, the joint declaration of Judges Shi and Vereshchetin: ibid., pp. 631-632.

[67] In its Order of 17 December 1997 on the admissibility of Yugoslavia's counter-claims in that case, the Court reiterated the *erga omnes* character of the prohibition against genocide but held that "the argument drawn from the absence of reciprocity in the scheme of the Convention is not determinative as regards the assessment of whether there is a legal connection between the principal claim and the counter-claim, insofar as the two Parties pursue, with their respective claims, the same legal aim, namely the establishment of legal responsibility for violations of the Genocide Convention" (para. 35). In a separate opinion, Judge Lauterpacht noted that:

> "The closer one approaches the problems posed by the operation of the judicial settlement procedure contemplated by article IX of the Genocide Convention, the more one is obliged to recognize that these problems are of an entirely different kind from those normally confronting an international tribunal of essentially civil, as opposed to criminal, jurisdiction. The difficulties are systemic and their solution cannot be rapidly achieved"

(ibid., para. 23)

[68] Judgment of 29 October 1997, para. 25; *International Law Reports*, vol. 110, pp. 697-698.

[69] It was not argued in that case that the Tribunal itself had the power to enforce "subpoenas" issued to States: this would have been a matter for the Security Council itself.

[70] For the ruling of the Secretary-General see *United Nations Reports of International Arbitral Awards*, vol. 19, p. 199. For the decision of the Arbitral Tribunal see ibid., vol. 20, p. 217.

discrimination on grounds of race or of the maintenance by force of colonial domination.[71] The Commission concluded from a review of action taken within the framework of the United Nations that:

> "in the general opinion, some of these acts genuinely constitute 'international crimes', *that is to say*, international wrongs which are more serious than others and which, as such, should entail more severe legal consequences. This does not, of course, mean that all these crimes are equal – in other words, that they attain the same degree of seriousness and necessarily entail all the more severe consequences incurred, for example, by the supreme international crime, namely, a war of aggression."[72]

65. State practice in the period from 1976 to 1995 was reviewed by Professor Arangio-Ruiz in his seventh report;[73] his review need not be repeated here. A number of features of the practice of this period may, however, be recalled. They include:

- The "rebirth" of activity of the Security Council under Chapter VII of the Charter of the United Nations, with vigorous action taken, for example, against Iraq in respect of Kuwait, and against the Libyan Arab Jamahiriya in respect of its alleged involvement in a terrorist bombing;[74]
- The progressive development of systems of individual accountability for certain crimes under international law, through the ad hoc Tribunals for the former Yugoslavia and Rwanda and, prospectively, the International Criminal Court;[75]
- The further development of substantive international criminal law across a range of topics, including, most recently, the protection of United Nations peacekeeping forces and action against terrorist bombings;[76]
- Continued development of legal constraints against the use of chemical, biological and bacteriological weapons, and against the further proliferation of nuclear weapons.

On the other hand, this period has been characterized by a degree of inconsistency. No international action was taken, for example, in response to the Cambodian genocide,[77] or to the aggression which initiated the 1980-1988 Iraq-Iran War.[78] Perhaps more relevantly, the measures taken by the Security Council since 1990 have not involved "criminalizing" States, even in circumstances of gross violation of basic norms. For example, the two ad

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[71] See the review of practice in the commentary to article 19, paras. (12)-(32), in *supra*, note 57.

[72] Commentary to article 19, para. (33) (emphasis added), in ibid. For the Commission's review of the literature see ibid., paras. (35)-(49).

[73] A/CN.4/469, p. 28-32.

[74] As to the latter see *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Request for the Indication of Provisional Measures), I. C. J. Reports 1992*, p. 114; ibid., *Preliminary Objections*, Judgment of 27 February 1998.

[75] The draft statute for an international criminal court limited the jurisdiction of the Court to crimes of individual persons. See *Yearbook ... 1994*, vol. II (Part Two), p. 18-73. No change to this aspect of the draft statute has been proposed in subsequent discussions.

[76] Convention on the Safety of United Nations and Associated Personnel, General Assembly resolution 49/59 of 9 December 1994; International Convention for the Suppression of Terrorist Bombings, General Assembly resolution 52/164 of 15 December 1997.

[77] See General Assembly resolution 3238 (XXIX) of 29 November 1974; General Assembly resolution 44/22 of 16 November 1989, calling, *inter alia*, for "non-return to the universally condemned policies and practices of a recent past".

[78] See "Further report of the Secretary-General on the implementation of Security Council resolution 598 (1987)" (S/23273) of 9 December 1991, para. 7, referring to "Iraq's aggression against Iran – which was followed by Iraq's continuous occupation of Iranian territory during the conflict – in violation of the prohibition of the use of force, which is regarded as one of the rules of *jus cogens*".

hoc tribunals established by the Security Council have jurisdiction only over individual persons in respect of defined crimes against international law, and not over the States which were, prima facie, implicated in those crimes.[79] Iraq has to all intents and purposes been treated as a "criminal State" in the period since its invasion of Kuwait, but the Security Council resolutions relating to Iraq have not used the terminology of article 19. Chapter VII resolutions passed since 1990 have consistently used the formula "threat to or breach of the peace", and not "act of aggression". The notion of "threat to or breach of the peace" has been gradually extended to cover situations of essentially humanitarian (as distinct from inter-State) concern. But those resolutions have not relied on the concept of an "international crime" in the sense of article 19, despite numerous references to the prosecution of crimes under international and national law.

D. Relations between the international criminal responsibility of States and certain cognate concepts

66. At the same time, certain basic concepts of international law laid down in the period 1945-1970 have been consolidated.

1. Individual criminal responsibility under international law

67. The Nürnberg principles, involving the accountability of individuals, whatever their official position, for crimes against international law, have been reinforced by the development of additional conventional standards and, perhaps more importantly, by new institutions. The two ad hoc tribunals were established under Chapter VII of the Charter of the United Nations. Their creation and operation have added impetus to the movement for a permanent international criminal court. The position was summarized by the Secretary-General in 1996 in the following words:

> "the actions of the Security Council establishing international tribunals on war crimes committed in the former Yugoslavia and in Rwanda, are important steps towards the effective rule of law in international affairs. The next step must be the further expansion of international jurisdiction. The General Assembly in 1994 created an ad hoc committee to consider the establishment of a permanent international criminal court, based upon a report and draft statute prepared by the International Law Commission. The Assembly has since established a preparatory committee to prepare a draft convention for such a court that could be considered at an international conference of plenipotentiaries. This momentum must not be lost. The establishment of an international criminal court would be a monumental advance, affording, at last, genuine international jurisdictional protection to some of the world's major legal achievements. The benefits would be manifold, enforcing fundamental human rights and, through the prospect of enforcing individual criminal responsibility for grave international crimes, deterring their commission."[80]

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[79] Similarly the draft Code of Crimes against the Peace and Security of Mankind as completed by the Commission in 1996 provides exclusively for individual responsibility: see article 2 and commentary, in *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10* (A/51/10), pp. 18-28. This is "without prejudice to any question of the responsibility of States under international law": article 4, ibid., p. 30.

[80] "Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies. Supplement to reports on democratization", A/51/761, annex, para. 114.

In addition, trials and inquiries have been instituted in a number of States in the past decade in respect of crimes under international law.[81]

2. Peremptory norms of international law (*jus cogens*)

68. The Vienna Convention on the Law of Treaties (which came into force in 1980) has been widely accepted as an influential statement of the law of treaties, including the grounds for the validity and termination of treaties.[82] Although one or two States have continued to resist the notion of *jus cogens* as expressed in articles 53 and 64 of the Convention,[83] predictions that the notion would be a destabilizing factor have not been borne out.[84] There has been no case of invocation of article 66 (a) of the Convention, and the International Court has not had to confront the notion of *jus cogens* directly. It has however taken note of the concept.[85] Indeed, in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the Court stated that "because a great many rules of international humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' ... they constitute intransgressible principles of international customary law".[86]

3. Obligations *erga omnes*

69. Most significant for present purposes is the notion of obligations *erga omnes*, introduced and endorsed by the Court in the *Barcelona Traction Case (Second Phase)*, and heavily relied on by the Commission in its commentary to article 19. The Court there referred to "an essential distinction between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection".[87] The Court instanced "the outlawing of acts of aggression, and of genocide" as well as "the basic rights of the human person, including protection from slavery and racial discrimination" as examples of obligations *erga omnes*. It is true that, in a passage less often cited, it went on to say that "on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the infringements

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[81] See, e.g., *Polyukovich v. Commonwealth of Australia*, *International Law Reports*, vol. 91 (1991), p. 1 (Australia, High Court); *R v. Finta*, *International Law Reports*, vol. 82 (1989), p. 424 (Canada, High Court), on appeal 98 *International Law Reports*, vol. 98, p. 520 (Ontario CA), on further appeal, *International Law Reports*, vol. 194, p. 284 (Supreme Court); *Barbie*, *International Law Reports*, vol. 78 (1984), p. 125, *International Law Reports*, vol. 78 (1985), p. 136, *International Law Reports*, vol. 100 (1988), p. 330 (France, Cour de Cassation); *Touvier*, ibid., p. 337 (France, Court of Appeal of Paris, Cour de Cassation). See also Border Guards Prosecution Case, ibid., p. 364 (Germany: Federal Supreme Court).

[82] See the judgment of 25 September 1997 in the *Case concerning the Gabcikovo-Nagymaros Project*, *I. C. J. Reports*, 1997, paras. 89-114.

[83] A/CN.4/488, comments by France under article 19, para. 2.

[84] The International Court has placed great stress on the stability of treaty relations: see, e.g., *Case concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, *I. C. J. Reports 1994*, p. 6; *Case concerning the Gabcikovo-Nagymaros Project*, ibid., 1997, para. 114.

[85] See, e.g., *Case concerning Military and Paramilitary Activities in and against Nicaragua*, *I. C. J. Reports 1986*, pp. 100-101.

[86] *I. C. J. Reports 1996*, p. 257. Despite its reference to "intransgressible principles", the Court held that it had no need to pronounce on the issue of *jus cogens*. The question before it related not to the "legal character of the norm ... the character of the humanitarian law which would apply to the use of nuclear weapons", but to "the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons", ibid., p. 258.

[87] *I. C. J. Reports 1970*, p. 32.

of such rights irrespective of their nationality".[88] This may imply that the scope of obligations *erga omnes* is not co-extensive with the whole field of human rights, or it may simply be an observation about the actual language of the general human rights treaties.

70. On a number of subsequent occasions the Court has taken the opportunity to affirm the notion of obligations *erga omnes*, although it has been cautious in applying it. Thus in the *Case concerning East Timor*, the Court said:

> "Portugal's assertion that the right of peoples to self-determination ... has an *erga omnes* character ... is irreproachable. The principle of self-determination ... is one of the essential principles of contemporary international law. However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*."[89]

In the *Genocide Convention case (Preliminary Objections)* the Court, after referring to a passage from its judgment in *Reservations to the Genocide Convention,* said that "the rights and obligations enshrined in the Convention are rights and obligations *erga omnes*".[90] This finding contributed to its conclusion that its temporal jurisdiction over the claim was not limited to the time after which the parties became bound *inter se* by the Convention.[91]

71. For present purposes it is not necessary to analyse these decisions, or to discuss such questions as the relation between "obligations" and "rights" of an *erga omnes* character.[92] What can be said is that the developments outlined above confirm the view that within the field of general international law there is some hierarchy of norms, and that the importance of at least a few basic substantive norms is recognized as involving a difference not merely of degree but of kind. Such a difference would be expected to have its consequences in the field of State responsibility. On the other hand it does not follow from this conclusion that the difference in the character of certain norms would produce two distinct regimes of responsibility, still less that these should be expressed in terms of a distinction between "international crimes" and "international delicts".

72. It is relevant to note here the preliminary, even exploratory, way in which the Commission in 1976 adopted that distinction and that terminology.

73. As to the distinction between the categories of more and less serious wrongful acts, in the first place, the Commission was rigorous in "resist[ing] the temptation to give any indication ... as to what it thinks should be the regime of responsibility applicable to the most serious internationally wrongful acts".[93] These issues were left completely open. Secondly, it seemed to deny that all "international crimes" or all "international delicts" would themselves be subject to a uniform regime. In short, not merely was there not a single

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[88] Ibid., p. 47.

[89] *I.C.J. Reports 1995*, p. 102.

[90] *I.C.J. Reports 1996*, p. 616.

[91] Ibid., p. 617.

[92] International law has always recognized the idea of "rights *erga omnes*", although the phrase was rarely used. For example, coastal States have always had a right *erga omnes* to a certain width of territorial sea; all States have a right *erga omnes* to sail ships under their flag on the high seas. Yet these rights give rise to purely bilateral relationships of responsibility in the event that they are infringed by another State. The notion of obligation *erga omnes* has distinct and broader implications.

[93] Commentary to art. 19, para. (53), in *supra* note 57.

regime for all internationally wrongful acts; it was doubtful whether there were two such regimes: "international wrongs assume a multitude of forms and the consequences they should entail in terms of international responsibility are certainly not reducible to one or two uniform provisions."[94] No doubt there is always the possibility that a particular rule will prescribe its own special consequences in the event of breach, or will be subject to its own special regime: this is true, in particular, of the paradigm international crime, the crime of aggression.[95] On the other hand, if the category of international crimes were to fragment in this way (bearing in mind that there are relatively few such crimes), one might ask: (a) what was left of the category itself, (b) how it could be resolved in advance that the category existed, without reference to the consequences attaching to particular crimes, and (c) how that investigation could be concluded without in effect codifying the relevant primary rules. Thirdly, the Commission denied that the way to proceed in developing the regime of responsibility for crimes was to establish "a single basic regime of international responsibility ... applicable to all internationally wrongful acts ... and ... to add extra consequences to it for wrongful acts constituting international crimes ..."[96] This "least common denominator" approach to international crimes – it might be called the "delicts plus" approach – was firmly rejected.[97] But it was essentially the approach later adopted by the Commission in determining the consequences of international crimes.

74. As to the terminology of "crimes" and "delicts", the Commission was strongly influenced by the use of the term "crime" in relation to the crime of aggression.[98] It is not clear what alternatives were considered. The Commentary says only that:

> "in adopting the designation 'international crime', the Commission intends only to refer to 'crimes' of the State, to acts attributable to the State as such. Once again it wishes to sound a warning against any confusion between the expression 'international crime' as used in this article and similar expressions, such as 'crime under international law', 'war crime', 'crime against peace', 'crime against humanity', etc., which are used in a number of conventions and international instruments to designate certain heinous individual crimes ..."[99]

This raises, but does not answer, the question why a term was adopted which had immediately to be distinguished from ordinary uses of that term in international law. It should be noted that since 1976 the term "international crime" has gained even wider currency as a reference to crimes committed by individuals which are of international

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[94] Ibid.

[95] Under articles 12, para. 1, 24, para. 1 and 39 of the Charter, the Security Council has a certain priority with respect to the determination, *inter alia*, of an act of aggression and its consequences. See the Commission's commentaries to arts. 20 (b) and 23 (c) of the draft statute for an international criminal court *Yearbook ... 1994*, vol. II (Part Two), pp. 38-39 and 44-45; and art. 16 of the draft Code of Crimes against the Peace and Security of Mankind, *Official Records of General Assembly, Forty-eighth Session, Supplement No. 10*, (A/51/10), p. 83-85.

[96] Commentary to art. 19, para. 54, *supra* note 57.

[97] Ibid.

[98] For example, in the Definition of Aggression, art. 5, para. 2; General Assembly resolution 3314 (XIX) of 14 December 1974.

[99] Commentary to art. 19, para. 59, *supra* note 57.

concern, including, but not limited to, crimes against international law.[100] Thus the risk of terminological confusion has been compounded.

75. Now that a complete set of draft articles exists, it is for the Commission to decide whether the issues left open in 1976 have been, or can be, satisfactorily resolved.

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[100] A search of the United Nations documentary database (1994-1998) reveals 174 references to the term "international crime", usually in phrases such as terrorism, international crime and illicit arms transfers, as well as illicit drug production, consumption and trafficking, which jeopardize the friendly relations among States": see General Assembly resolution 52/43 entitled: "Strengthening of security and cooperation in the Mediterranean region", of 17 December 1997, para. 8.

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Third report on reservations to treaties

By Mr. Alain Pellet, Special Rapporteur

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I. Introduction

A. The earlier work of the Commission on the topic

1. First report on reservations to treaties and the outcome

(a) The Special Rapporteur's conclusions in 1995

1. The topic "Reservations to treaties" was included in the Commission's agenda in 1994.

2. The Special Rapporteur submitted his first report in 1995.[1] In that report, he summarized the Commission's earlier work on reservations and its outcome, also setting out a brief list of the problems posed by the topic and making suggestions as to the scope and form of the Commission's future work on the topic.

3. The Commission considered the report at its forty-seventh session. Summarizing the conclusions that he had drawn from the Commission's consideration of the report, the Special Rapporteur stated as follows:

> "(b)[2] The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission's statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;
>
> "(c) The above arrangements shall be interpreted with flexibility and, if the Commission feels that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take;
>
> "(d) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions".[3]

4. These conclusions met with general approval both in the Sixth Committee and in the Commission itself and, although some Commission members expressed doubts as to one or another aspect of the approach taken, the approach was not called into question during consideration of the second report.[4] The Special Rapporteur views the conclusions as general guidelines to be used as a basis for consideration of the topic.

(b) Questionnaires circulated to States and international organizations

5. At its forty-seventh session, the Commission authorized the Special Rapporteur to prepare a detailed questionnaire, as regards reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which are depositaries of multilateral conventions.[5] In its resolution 50/45 of 11 December 1995, the General Assembly invited States and international organizations, particularly those

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[1] A/CN.4/470 and Corr.1.

[2] Subparagraph (a) concerned the amendment of the title of the topic; the original title was "The law and practice relating to reservations to treaties".

[3] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 491.

[4] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), paras. 116-123.

[5] Ibid., *Fiftieth Session, Supplement No. 10* (A/50/10), para. 493.

which are depositaries, to answer promptly the questionnaire prepared by the Special Rapporteur on the topic concerning reservations to treaties.[6]

6. Accordingly, the Special Rapporteur drew up a detailed questionnaire that the Secretariat circulated to States Members of the United Nations and to the members of specialized agencies and the parties to the Statute of the International Court of Justice. So far, 32 States[7] have responded to the questionnaire, mostly confining themselves to answering the questions to which the Special Rapporteur had drawn special attention, relating more particularly to the issues dealt with in the second and current reports.[8] Most of the States concerned enclosed with their replies a wealth of very interesting documentation concerning their reservations practice.

7. In addition, the Special Rapporteur prepared a similar questionnaire that was circulated to international organizations that are depositaries of multilateral treaties. So far, 22 such organizations have responded to the questionnaire either completely or partially.[9]

8. The number of replies to the questionnaires,[10] which are long, detailed and technical – since it was only on the basis of such a text that a clear picture could be gained of the reservations practice of States and international organizations[11] – indicates that there is great interest in the topic and confirms that studying it meets a real need.

2. Second report and the outcome

(a) Consideration of the second report by the Commission

9. The second report, which was submitted in 1996, consisted of two entirely different chapters.[12] In the first, the Special Rapporteur set out an "Overview of the study" and made

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[6] Para. 5 of the resolution.

[7] Argentina, Bolivia, Canada, Chile, Colombia, Croatia, Denmark, Ecuador, Estonia, Finland, France, the Holy See, Germany, India, Israel, Italy, Japan, Kuwait, Malaysia, Mexico, Monaco, Panama, Peru, Republic of Korea, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States. The Special Rapporteur wishes to express his gratitude to these States once again. He hopes that they will be able to supplement their replies and that other States will respond to the questionnaire in the near future.

[8] See para. 6 of the questionnaire's covering note.

[9] Bank for International Settlements (BIS), Council of Europe, Food and Agriculture Organization of the United Nations (FAO) Forum Secretariat, International Atomic Energy Agency (IAEA), International Civil Aviation Organization (ICAO), International Fund for Agricultural Development (IFAD), International Labour Organization (ILO), International Maritime Organization (IMO), International Monetary Fund (IMF), International Telecommunication Union (ITU), Latin American Integration Association (LAIA), Organization for Security and Cooperation in Europe (OSCE), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Industrial Development Organization (UNIDO), Universal Postal Union (UPU), Western European Union (WEU), World Bank (International Bank for Reconstruction and Development (IBRD), International Development Association (IDA), International Finance Corporation (IFC), Multilateral Investment Guarantee Agency (MIGA)), World Customs Organization, World Health Organization (WHO), World Intellectual Property Organization (WIPO), World Trade Organization (WTO). The Special Rapporteur wishes to thank these organizations also; he hopes that organizations that have as yet not responded to the questionnaire will do so within the next few months.

[10] The percentages in question – 17 per cent in the case of States (32 out of a total of 187 States that received questionnaires) and 38 per cent in the case of international organizations – may not seem very high, but they by far exceed the proportion normally found in connection with such exercises.

[11] The questionnaires are almost entirely factual. The aim is not to determine the "normative preferences" of States and international organizations but, rather, to attempt to establish, by means of their replies, what their actual practice is and in so doing identify difficulties they encounter.

[12] A/CN.4/477 and Add.1.

a number of suggestions with respect to the future work of the Commission on the topic of reservations to treaties.[13] Chapter II, entitled "Unity or diversity of the legal regime for reservations to treaties", was subtitled "Reservations to human rights treaties" and concluded that despite the great diversity of multilateral treaties, the reservations regime set out in articles 19 to 23 of the Vienna Convention of 1969 on the Law of Treaties and the Vienna Convention of 1986 on the Law of Treaties between States and International Organizations or between International Organizations was suitable for all treaties including human rights treaties, owing to its flexibility.

10. Furthermore, in view of the recent practice of human rights treaty monitoring bodies, the Rapporteur expressed the view that the Commission, as the United Nations body chiefly responsible for the progressive development and codification of international law, should state its views in that respect, and he annexed to his second report a draft resolution of the Commission on reservations to human rights treaties.[14]

11. The Special Rapporteur also annexed to his second report a "Bibliography concerning reservations to treaties",[15] a more complete and updated version of which he intends to annex to his fourth report.[16]

12. Owing to lack of time, the Commission was unable to consider the second report in 1996, at its forty-eighth session; the Special Rapporteur briefly presented it at that session, and some members stated their reactions in a very preliminary fashion.[17] However, the report was discussed in depth at the Commission's forty-ninth session, in 1997.[18]

13. This discussion gave rise to an extensive exchange of views in the Commission, and it was thus possible to establish or reaffirm that there was broad agreement on the approach to be taken. In particular:

- Members agreed that in principle the Vienna regime should be preserved and that all that was needed was to remedy its ambiguities and fill the lacunae in it;
- While stressing that the undertaking was ambitious, most speakers reaffirmed their support for the decision taken in the previous quinquennium to prepare a guide to practice accompanied, if necessary, by model clauses.

14. With respect to the legal regime of reservations to normative treaties, including human rights treaties, the Commission referred the draft resolution proposed by the Special Rapporteur[19] to the Drafting Committee; on the basis of the Drafting Committee's report the Commission adopted not a resolution but the "Preliminary Conclusions of the International Law Commission on reservations to normative multilateral treaties, including human rights treaties adopted by the Commission".[20]

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[13] A/CN.4/477, paras. 9-50.

[14] A/CN.4/477/Add.1, p. 86.

[15] A/CN.4/478.

[16] The Special Rapporteur wishes to take this opportunity to thank Commission members who kindly provided him with the titles of books and articles that he did not mention in 1996, and to ask all Commission members to transmit to him titles that should be added to the bibliography. He thanks them in advance.

[17] See *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), paras. 108-140.

[18] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), paras. 50-156.

[19] See para. 10 above.

[20] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. 157.

(b) Consultation of human rights bodies on the preliminary conclusions of the Commission

15. The Commission also decided to transmit its preliminary conclusions to the human rights treaty monitoring bodies. By means of letters dated 24 November 1997 transmitted through the Secretary of the Commission, the Special Rapporteur sent copies of the preliminary conclusions and of chapter V of the Commission's report on the work of its forty-ninth session to the chairmen of human rights bodies with universal membership,[21] requesting them to communicate the documents in question to the members of their Committees and to inform him of any comments made. He also sent similar letters to the presiding officers of a number of regional bodies.[22]

16. The Special Rapporteur has so far received a response only from the Chairman of the Human Rights Committee, who in a letter dated 9 April 1998 informed him that the Committee welcomed the opportunity to comment on the preliminary conclusions and that it intended to study them and respond in greater detail at a later date; in the meantime, however, the Committee indicated, with respect to paragraph 12 of the preliminary conclusions, that:

> "Regional bodies are not only the intergovernmental institutions which participate in and contribute to the development of practices and rules. Universal monitoring bodies, such as the Human Rights Committee, play no less important a role in the process by which such practices and rules develop and are entitled, therefore, to participate in and contribute to it. In this context, it must be recognized that the proposition enunciated by the Commission in paragraph 10 of the preliminary conclusions is subject to modification as practices and rules developed by universal and regional monitoring bodies gain general acceptance."

Furthermore, the Special Rapporteur has learned that a number of human rights bodies had been interested to take note of the communication in question and that they intended to respond to the Commission's preliminary conclusions. In addition, the chairmen of bodies established pursuant to human rights instruments considered the issue at their meeting in February 1998.

(c) Consideration of the report of the Commission by the Sixth Committee

17. The great number of comments, mostly positive, made on the subject of the second report during the Sixth Committee debate at the fifty-second session of the General Assembly is also indicative of the amount of interest there is in the topic of reservations to treaties: 50 delegations commented on the topic, often making detailed and well-argued remarks.[23]

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[21] Letters were sent to the Chairmen of the Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee against Torture and the Committee on the Rights of the Child.

[22] Letters were sent to the presiding officers of the African Commission on Human and People's Rights, the European Commission of Human Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

[23] See A/C.6/52/SR.17-25.

18. The principle of the unity of the reservations regime, stated by the Commission in paragraphs 2 and 3 of its preliminary conclusions, met with wide approval.[24]

19. The discussions concerned above all the role of human rights bodies with respect to reservations, i.e., chiefly paragraphs 5 to 10 of the preliminary conclusions. As indicated in the "Topical summary" prepared by the Secretariat,[25] there were two opposing positions. Some delegations thought that it was for States alone to decide on the admissibility of reservations and to determine the consequences of inadmissibility. A virtually equal number of delegations endorsed paragraphs 5 and 6 of the preliminary conclusions and expressed the view that the admissibility of reservations should be assessed jointly by monitoring bodies, where they existed, and States parties to the human rights conventions.

20. However, almost all delegations that expressed views "agreed with the Commission's Preliminary Conclusion 10 that the rejection of a reservation as inadmissible conferred some responsibility on the reserving State to respond or to take action. Given the consensual nature of treaties, reservations were inseparable from the consent of the State to be bound by a treaty";[26] only two States though otherwise.[27] However, interesting suggestions were put forward *de lege ferenda* on this issue by a number of delegations, with the aim of establishing a dialogue between the reserving State and objecting States,[28] or between the reserving State and the monitoring body,[29] or of institutionalizing a centralized monitoring mechanism.[30]

21. With regard to form, in general, the Commission's initiative of adopting preliminary conclusions and consulting interested human rights bodies was well received by the Sixth Committee. However, one delegation expressed the view that there was no reason to limit consultation in that manner and that all monitoring bodies established under multilateral conventions, whatever their purpose, should be consulted;[31] that concern is reflected in paragraph 4 of resolution 52/156 of 15 December 1997, in which the General Assembly:

> "*Takes note* of the invitation by the International Law Commission to all treaty bodies set up by normative multilateral treaties that may wish to do so to provide, in writing, their comments and observations on the preliminary conclusions of the Commission on reservations to normative multilateral treaties, including human rights treaties ..."

However, the question remains as to exactly which bodies are to be consulted, apart from human rights bodies.

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[24] See the "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-second session prepared by the Secretariat", document A/CN.4/483, paras. 65-67; just two delegations (the delegations of the Republic of Korea (A/C.6/52/SR.22, para. 7) and, in a more qualified manner, Italy (A/C.6/52/SR.24, para. 82)) expressed the view that special regimes might be useful in certain cases; the model clauses that the Commission intends to adopt would no doubt meet that concern.

[25] A/CN.4/483, paras. 71-82.

[26] Ibid., para. 84.

[27] Costa Rica (A/C.6/52/SR.22, para. 19) and Greece (ibid., paras. 42-44); also see Sweden's statement on behalf of the Nordic countries (A/C.6/52/SR.21, paras. 11-12).

[28] Statements by the United Kingdom (A/C.6/52/SR.19, para. 46) and Austria (A/C.6/52/SR.21, para. 6).

[29] Statements by Liechtenstein (A/C.6/52/SR.22, para. 25) and Switzerland (ibid., para. 85).

[30] Statements by Germany (A/C.6/52/SR.21, para. 46) and Chile (A/C.6/52/SR.22, para. 36).

[31] Statement by Tunisia (A/C.6/52/SR.22, para. 32).

22. Furthermore, while some delegations in the Sixth Committee welcomed the preliminary conclusions, others believed that they had been adopted prematurely.[32] As the Special Rapporteur indicated when he addressed the Sixth Committee, speaking as Rapporteur, that view appears to be based on a misunderstanding:[33] the purpose of the text adopted by the Commission is to respond to recent initiatives on the part of a number of human rights bodies, and the text represents the provisional culmination of the discussion that took place in 1997 on the fundamental issue of the unity or diversity of the reservations regime; to have waited until consideration of the topic had been completed would have meant that neither the Sixth Committee nor the Commission itself would have been able to participate in the discussion initiated by the human rights bodies and, in particular, by General Comment No. 24 of the Human Rights Committee.[34] Furthermore, the preliminary nature of the Commission's conclusions and its decision to consult interested human rights bodies would seem such as to allay the fears that were expressed (which were very much in the minority).

23. In any event, the Special Rapporteur considers that time should now be allowed to play its part: the Commission has taken a preliminary position and has consulted States[35] and the human rights bodies.[36] They must be given time to respond and it seems logical that the Commission should not revert to the topic until it has been apprised of their reactions and has completed its consideration of the most controversial questions left pending by the Vienna Conventions. The Special Rapporteur therefore proposes, in accordance with the programme of work adopted at the forty-ninth session,[37] to submit draft definitive conclusions to the Commission in his fifth report, when consideration of the substantive questions relating to the regime of reservations to treaties has been completed.

24. The discussion in the Sixth Committee likewise gave the representatives of States an opportunity to confirm their agreement with the essential features of the general approach adopted by the Commission. A very great majority of delegations:

Reiterated the support expressed in previous years for the preparation of a guide to practice,[38] and

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[32] Statements by Mexico (A/C.6/52/SR.17, para. 22), the Netherlands (A/C.6/52/SR.21, para. 15), Guatemala (ibid., para. 65), Tunisia (A/C.6/52/SR.22, para. 32), Greece (ibid., para. 48), Switzerland (ibid., para. 87) and Bangladesh (A/C.6/52/SR.25, para. 24).

[33] A/C.6/52/SR.24, para. 97.

[34] CCPR/C/21/Rev.1/Add.6.

[35] In paragraph 2 of resolution 52/156, the General Assembly drew "the attention of Governments to the importance for the International Law Commission of having their views on all the specific issues identified in chapter III of its report and in particular on [...] (b) the preliminary conclusions of the Commission on reservations to normative multilateral treaties, including human rights treaties". Three Governments, those of Monaco, Liechtenstein and the Philippines, have already sent their comments to the Special Rapporteur, who is extremely grateful to them and sincerely hopes that their example will be followed by many other Governments. He intends to give a detailed account of the views communicated to him on this issue in his fifth report.

[36] In its aforementioned observations (see footnote 35), Liechtenstein expressed the hope that non-governmental organizations active in the field of human rights would likewise be invited to express their views. The Special Rapporteur would welcome any communication that these non-governmental organizations might wish to send him.

[37] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. 221.

[38] A/CN.4/483, para. 90; only the delegation of the Republic of Korea (A/C.6/52/SR.22, para. 4) expressed a preference for a legally binding instrument, while the delegation of Canada (A/C.6/52/SR.21, para. 41) expressed reservations concerning the need for model clauses.

Called on the Commission to respect the general framework of the Vienna Conventions,[39] the ambiguities and lacunae of which were nevertheless emphasized by many delegations.

25. In particular, the representatives of States requested the Commission to consider the following points:

The precise definition of reservations, especially in comparison with interpretative declarations;

The question of reservations to bilateral treaties;

The legal regime of interpretative declarations;

The precise scope of the concept of object and purpose of a treaty;

The effects of an objection to a reservation;

The problem of the validity of objections;

The consequences of the impermissibility of a reservation; and

The effects of reservations to provisions reproducing rules of *jus cogens*.

The Special Rapporteur proposes to take up each of these problems in due course (some of them this year).

26. Generally speaking, the Special Rapporteur feels that the discussion in the Sixth Committee seems to confirm the validity of the general approach adopted by the Commission since 1995.

(d) Action by other bodies

27. Another sign of the international community's interest in the topic is the action taken by two bodies with which the Commission has a cooperative relationship: the Council of Europe and the Asian-African Legal Consultative Committee.

28. With regard to the former, the Committee of Legal Advisers on Public International Law (CAHDI), at its fourteenth meeting, held in September 1997, considered the preliminary conclusions adopted by the Commission and, more generally, the latter's work on the topic of reservations, and decided to establish a Group of Specialists on Reservations to International Treaties (DI-S-RIT), under the coordination of the representative of Austria, whose terms of reference were approved by the Committee of Ministers of the Council of Europe on 16 December 1997. The Group will be called upon to:

"(a) examine and propose ways and means and, possibly, guidelines to assist member States in developing their practice regarding their response to reservations and interpretative declarations actually or potentially inadmissible under international law and

(b) consider the possible role of the CAHDI as an 'observatory' of reservations to multilateral treaties of significant importance to the international community raising issues as to their admissibility under international law, and as an

[39] A/CN.4/483, paras. 61, 65 and 90-91. Only the delegations of Sweden (speaking on behalf of the Nordic countries) (A/C.6/52/SR.21, paras. 8 and 9) and, more overtly, the delegation of the Netherlands (ibid., para. 14) questioned the sacrosanct character of the Vienna regime.

observatory of reactions by Council of Europe member States Parties to these instruments."[40]

29. The Group held its first meeting in Paris on 26 and 27 February 1998 and on that occasion had an exchange of views with the Commission's Special Rapporteur. The conclusions drawn up by its presiding officer read as follows:

"The Group shared the view of the ILC that:

– the regime of the Vienna Convention is applicable to all treaties, including normative and human rights treaties;

– the regime should not be changed.

However, it was felt that the issue of the role of monitoring bodies still required further consideration; some delegations were not in full agreement with conclusions 5 and following [of the ILC preliminary conclusions], in particular the articulation between *lex lata* and *lex ferenda* provisions. On the whole, however, the Group was agreeable to the main thrust of the preliminary conclusions."[40bis]

30. The Asian-African Legal Consultative Committee (AALCC) held its thirty-seventh session in New Delhi from 13 to 18 April 1998, chaired by Mr. P. S. Rao. The International Law Commission was represented at the session by Mr. Yamada. It should be noted that AALCC treated the question of reservations to treaties as a special topic and devoted particular attention to it.[41]

B. General presentation of the third report

1. Method used

31. Since there is a quasi-consensus, both in the Commission and among States, that the Vienna regime must be preserved, it would seem appropriate to base the work systematically on the provisions concerning reservations in the Conventions of 1969, 1978 (to the limited extent to which they may be relevant to the general study of that regime) and 1986.

32. The Special Rapporteur therefore proposes to base this report, and indeed the next three reports, on the following general outline:

– Each chapter will begin by recalling the relevant provisions of the three Vienna Conventions on the law of treaties[42] and the *travaux préparatoires* leading to their adoption;

– Next, the Special Rapporteur will describe the practice of States and international organizations with regard to those provisions and any difficulties to which their application has given rise; in that context, the replies to questionnaires which he has received[43] will be particularly valuable;

– Simultaneously or in a separate section, as appropriate, he will describe the relevant judicial practice and the commentaries of jurists;

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[40] For a general presentation of this Group, see the introductory document for its first meeting, DI-S-RIT(98)1, Strasbourg, 2 February 1998.

[40bis] Document CAHDI(98/8) of 3 March 1998.

[41] At the time when he was drafting this report, the Special Rapporteur did not have a record of this important meeting.

[42] In order to avoid any confusion, these provisions will be systematically printed in bold type.

[43] See paragraphs 5-8 above.

- On the basis of this information, he will propose a series of draft articles that will form the guide to practice which the Commission intends to adopt,[44] together with preliminary commentaries specifying the scope he ascribes to them.[45]

- Where appropriate, the draft articles will be accompanied by model clauses which States could use when derogating from the guide to practice in special circumstances or specific fields.[46]

33. It goes without saying that it will be necessary to deviate from this outline on certain points. In particular, this will happen when the Vienna Conventions remain completely silent, for example in the case of interpretative declarations, to which the Conventions make absolutely no allusion. In such cases, the Special Rapporteur will revert to the usual methodology employed in preparing the Commission's draft articles, that is, he will base the work directly on international practice (see the second stage described above).

34. In other instances, however, the Vienna Conventions may provide sufficient guidelines for practice (for example, in the case of the "positive" definition of reservations[47]). The Special Rapporteur nevertheless feels that there would be no justification for excluding them from the study or even from the guide to practice under consideration. Silence on this point would make the draft incomplete and difficult to use, whereas its purpose is precisely to make available to "users" – legal services in ministries of foreign affairs and international organizations, ministries of justice, judges, lawyers, specialists in public or private international relations – a reference work that is as complete and comprehensive as possible.

35. The Special Rapporteur wishes to note, however, that despite his efforts to be as exhaustive, precise and rigorous as possible, he is well aware of the imperfections of his work. Since he has no assistance, his approach is necessarily empirical: there is a considerable amount of writing devoted to reservations,[48] practice takes many forms, and the replies to questionnaires already fill several volumes. A systematic analysis would necessitate the recruitment of a team of researchers and/or full-time work. Unfortunately, this is beyond the Special Rapporteur's means. He acknowledges, therefore, that he has often had to proceed by "taking soundings" and to trust his intuition. The Commission's methods of work nevertheless have the advantage of limiting the shortcomings of this method (or absence of method?): by reason of its consideration by the Commission, the individual study becomes a collective one. Furthermore, the reactions of Governments, both individually and collectively in the Sixth Committee, ensure that the work will be realistic and that, where necessary, the draft guide to practice can be brought into line with real needs.

36. On the other hand, the Special Rapporteur wishes to respond in advance to possible future criticism regarding the somewhat lengthy nature of following expositions, especially those concerning the presentation of the *travaux préparatoires* relating to the relevant provisions of the three Vienna Conventions. There are, indeed, grounds for questioning the need for such a detailed description. The Special Rapporteur feels, however, that the description will be useful for at least two reasons. First, and this holds true for all the draft articles prepared by the Commission, it constitutes the basis and justification of the normative provisions (contained in the draft guide to practice) that will be derived from it. Second – and this is particularly true in the case of the present draft – it would seem useful

[44] In order to avoid any confusion, these draft articles will be systematically printed in italics.

[45] The Special Rapporteur will not provide commentaries to the articles of the Vienna Conventions, except when he combines them in a "composite" article – on this point, see paragraph 40 below.

[46] In order to avoid any confusion, these model clauses will be systematically underlined.

[47] See chap. II, sect. 1, para. 1 (b) below.

[48] See the non-exhaustive compilation in the aforementioned bibliography, footnote 15.

for practitioners, and especially Governments, to have at their disposal documentation which is exhaustive (or as exhaustive as possible) in order that they may decide whether, in a given case, it would be appropriate to act on the basis of the proposed guide.

37. Lastly, attention must be drawn to a difficulty peculiar to the present study: the topic under consideration relates to "reservations to treaties" in general. This subject has already been treated in three conventional instruments, and while there is no doubt that the 1969 Vienna Convention is the primary instrument of reference and the starting point for any reflection on the topic, it would be unwise to neglect the 1978 Convention on Succession of States in respect of Treaties or, above all, the 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations. In accordance with the procedure followed from the first report onward, which has not been questioned either in the Commission or in the Sixth Committee, the Special Rapporteur intends to study all three Conventions simultaneously and combine the results in a guide to practice which will be "consolidated", in that it will contain provisions relating to reservations to treaties to which States and international organizations are parties and set forth the rules applicable in the case of succession of States.[49]

38. This method has a definite advantage in that it makes it possible to verify the coherence of the existing conventional provisions, carry out useful cross-checks and "test" the solidity of the structure as a whole. Moreover, the rules set forth in one Convention often elucidate or complement those contained in the others(as is shown, for example, in chapter II of this report, in connection with the definition of reservations). Furthermore, the *travaux préparatoires* of each Convention (especially those of 1969 and 1986) are likewise complementary and often clarify each other.

39. Of course, the requisite distinctions will be made whenever necessary. Generally speaking, that does not pose any major problems, since the 1978 and 1986 Conventions seem to be the consequences, prolongations and illustrations of provisions of the 1969 Convention relating to specific, quite clearly defined issues. In some cases, however, the exercise will inevitably lead to the cumulation of existing provisions and make it necessary to reflect on the way in which they combine and relate to each other.

40. In certain cases it will also lead to the adoption of "composite texts" combining elements from each of the Vienna Conventions or from two of them. The definition of reservations, as presented in chapter II of this report, exemplifies this method, which must be used if comprehensive codification is the objective:

- The definition of reservations to treaties between States is contained in article 2, paragraph 1 (d), of the 1969 Convention;
- If the aim is to define reservations to treaties "in general", this definition must be completed by that contained in article 2, paragraph 1 (d), of the 1986 Convention;
- Moreover, when the 1969 Convention was adopted, the question of succession of States was deliberately ignored;[50] during the preparation of the 1978 Convention, however, it was noted that the phenomenon of State succession had an impact on the definition of reservations, at least as conceived by the drafters of the three Conventions.

[49] The fifth part of the "provisional general outline" set forth in document A/CN.4/477 (see para. 42 below): "V. Fate of reservations, acceptances and objections in the case of succession of States".

[50] See article 73 of the 1969 Convention.

In a case such as this, simply juxtaposing the existing texts in the guide to practice would create very great complications for users; the problem can only be dealt with properly in a composite text.[51]

41. It may be noted that this course would be consistent with the hopes, or rather the predictions, of Paul Reuter who, during the discussion of his third report, envisaged that "it might perhaps be decided some day to try to combine the two sets of articles"[52] and that an effort would be made to solve the problems raised by "any adjustment which the existence of two conventions might necessitate".[53] That is also one of the aims of the guide to practice, a fact which does not facilitate its preparation.

2. Plan of the third report

42. In chapter I of his second report, the Special Rapporteur presented a provisional "general outline of the study" that he intended to carry out.[54]

43. Very few comments were made on this general outline during the consideration of the second report in 1997, at the forty-ninth session.[55] However, the programme of work adopted by the Commission at that session endorsed the main contours of that outline,[56] leading the Special Rapporteur to believe that he can follow them in preparing his future reports, including the third, but without regarding them as a rigid guide and adapting and clarifying them as appropriate.

44. That being so, and in accordance with the indications given in 1997 and in the programme of work adopted by the Commission,[57] this report covers parts II and III of the provisional general outline, dealing respectively with the definition of reservations[58] and with the formulation and withdrawal of reservations, acceptances and objections.[59]

45. The Special Rapporteur nevertheless faced a problem concerning the legal regime of interpretative declarations. At the outset, he intended to treat this very important problem[60]

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[51] See para. 82 below.

[52] Reuter was referring here to the Vienna Convention on the Law of Treaties and the draft articles on the law of treaties between States and international organizations or between international organizations.

[53] *Yearbook ... 1974*, vol. I, 1279th meeting, 17 June 1974, para. 52.

[54] A/CN.4/477, paras. 37-50.

[55] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), paras. 116-123.

[56] Ibid., para. 221.

[57] Ibid.

[58] The provisional outline contains the following headings: (a) positive definition; (b) distinction between reservations and other procedures aimed at modifying the application of treaties; (c) distinction between reservations and interpretative declarations; (d) the legal regime of interpretative declarations; (e) reservations to bilateral treaties (A/CN.4/477, para. 37).

[59] Part III is subdivided into three sections:

A. *Formulation and withdrawal of reservations*: (a) acceptable times for the formulation of a reservation; (b) procedure regarding formulation of a reservation; (c) withdrawal.

B. *Formulation of acceptances of reservations*: (a) procedure regarding formulation of an acceptance; (b) implicit acceptance; (c) obligations and express acceptance.

C. *Formulation and withdrawal of objections to reservations*: (a) procedure regarding formulation of an objection; (b) withdrawal of an objection (Ibid.).

[60] Several delegations drew attention to this problem during the discussion in the Sixth Committee (see A/CN.4/483, para. 91). See also the positions on this issue taken by several members of the Commission at the forty-ninth session (*Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. 113).

as an element of part II, concerning the definition of reservations.[61] However, given the wealth of material it became clear that this solution was very unsatisfactory, especially since it would have been illogical to establish the legal regime of interpretative declarations before completing consideration of the legal regime of reservations. Thus, there were two options: a separate chapter could be devoted to the legal regime of interpretative declarations (which would have been placed right at the end of the study), or that regime could be considered in parallel with the regime of reservations, to which it would in a way constitute a counterpoise.

46. After some hesitation the Special Rapporteur chose the second alternative, and therefore plans systematically to present the draft articles of the guide to practice relating to the legal regime of interpretative declarations at the same time as the corresponding provisions relating to reservations. The two following chapters will illustrate this approach, since they deal simultaneously with the problems posed by the definition and formulation of reservations on the one hand and of interpretative declarations on the other.

47. That being so, this report will follow the following general plan:

Chapter II. *Definition of reservations* (and of interpretative declarations);

Chapter III. *Formulation and withdrawal of reservations* (and of interpretative declarations), *acceptances and objections to reservations* (and to interpretative declarations).[62]

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[61] See footnote 58 (d) above.

[62] Interpretative declarations are not expressly mentioned in the titles of these chapters in order to avoid making them too cumbersome.

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Third report on reservations to treaties

By Mr. Alain Pellet, Special Rapporteur

Addendum

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II. Definition of reservations to treaties (and of interpretative declarations)

48. The three Vienna Conventions on the law of treaties, each in its respective article 2, provide a "positive" definition of reservations which is generally accepted and does not, in itself, pose any real problems. However, given the silence of the Conventions with regard to the concept of "interpretative declarations" – an omission which is, *prima facie*, difficult to explain – it is necessary to consider this subject *ex nihilo* and to derive from practice, the writings of jurists and judicial decisions a definition permitting the clearest possible distinction between the two institutions (section A).

49. Furthermore, as indicated in the commentary on the provisional plan of the study contained in his second report,[63] the Special Rapporteur also intends, for the sake of convenience, to study in this chapter the question of "reservations" to bilateral treaties, whose nature has often been disputed (section B).

50. Lastly, as likewise noted in the second report on reservations to treaties,[64] it "seems useful to link the consideration of this question to that of other procedures, which, while not constituting reservations are, like them, designed to and do enable States to modify obligations under treaties to which they are parties", and thus constitute alternatives to reservations which may be useful in certain cases (section C).

A. Definition of reservations and of interpretative declarations

51. Each of the Vienna Conventions of 1969, 1978 and 1986 contains a definition of the term "reservation". Taken together, these definitions make it possible to prepare a composite text which seems to constitute a satisfactory comprehensive definition. On the other hand, interpretative declarations were not defined in any of the Conventions, although such a course was sometimes envisaged during the *travaux préparatoires*.

52. Consequently, after the definitions of reservations embodied in the Vienna Conventions and the circumstances in which those definitions were adopted have been recalled (subsection 1), it will be necessary to examine the reactions to those definitions expressed in the writings of jurists and any difficulties that their implementation has caused in practice so that they may, if appropriate, be completed (subsection 2), before formulating a draft definition of interpretative declarations (subsection 3).

1. The definition of reservations in the Vienna Conventions

(a) *Travaux préparatoires*

(i) The 1969 Vienna Convention

53. The definition of reservations did not give rise to lengthy discussion when the 1969 Vienna Convention was being drawn up.

54. The Commission's first Special Rapporteur on the law of treaties, James L. Brierly, proposed a definition of reservations, very different from that finally adopted, since he

[63] A/CN.4/477, para. 40.

[64] Ibid., para. 39.

regarded reservations on a purely contractual institution.[65] The second Special Rapporteur, Sir Hersch Lauterpacht,[66] proposed no definition. However, Sir Gerald Fitzmaurice, in his first report, issued in 1956, provided a very precise definition which, with a number of drafting changes, is the direct source of the existing definition and is all the more valuable because the third Special Rapporteur on the law of treaties took care to define reservations in contrast to "mere declarations".

55. Article 13, paragraph 1, of the draft "Code on the Law of Treaties" which he prepared reads as follows:

> "(1) A 'reservation' is a unilateral statement appended to a signature, ratification, accession or acceptance, by which the State making it purports not to be bound by some particular substantive part or parts of the treaty, or reserves the right not to carry out, or to vary, the application of that part or parts; but it does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty."[67]

56. Believing this definition to be self-explanatory,[68] Fitzmaurice provided no commentary to it. However, article 37, paragraph 1, of the draft Code stated:

> "Only those reservations which involve a derogation of some kind from the substantive provisions of the treaty concerned are properly to be regarded as such, and the term reservation herein is to be understood as limited in that sense."[69]

Commenting on that provision, the Special Rapporteur emphasized that "a reservation only counts as such if it purports to derogate from a substantive provision of the treaty".[70]

57. The provisions concerning reservations proposed in the first Fitzmaurice report were not considered by the Commission, which did not revert to the question of reservations until 1962, when it examined the first report of Sir Humphrey Waldock.[71] In that report, the fourth Special Rapporteur proposed another definition of reservations, which was modelled very closely on that proposed by his predecessor and likewise defined interpretative declarations, at least *a contrario*:

> "'Reservation' means a unilateral statement whereby a State, when signing, ratifying, acceding to or accepting a treaty, specifies as a condition of its consent to

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[65] "That word [reservation] is used as meaning a special stipulation which has been agreed upon, between the parties to a treaty, limiting or varying the effect to the treaty as it applies between a particular party and all or some of the remaining parties" (first report on the law of treaties, *Yearbook of the International Law Commission, 1950*, vol. II, document A/CN.4/23, pp. 238-239, para. 84). For the discussion on this point, see *op. cit.*, vol. I, pp. 90-91. For a brief commentary on this definition, see sect. 2 (b) (i) below. The 1951 Brierly report on reservations to treaties proposes no definition but has an annex B entitled "Opinions of writers" which reproduces numerous definitions formulated by jurists (*Yearbook ... 1951*, vol. II, document A/CN.4/41, pp. 1-17). For a summary of this early work, see the first report on reservations to treaties mentioned in footnote 1 above, paras. 12-22.

[66] See his first and second reports on the law of treaties, *Yearbook ... 1953*, vol. II, pp. 91-92 and 123-136, A/CN.4/63, and *Yearbook ... 1954*, vol. II, pp. 131-133, A/CN.4/87. See also the first report on reservations to treaties, A/CN.4/470, paras. 23-29.

[67] Sir Gerald Fitzmaurice, first report on the law of treaties, *Yearbook ... 1956*, vol. II, p. 110, document A/CN.4/101.

[68] Ibid., p. 119, para. 23.

[69] Ibid., p. 115.

[70] Ibid., p. 126, para. 92.

[71] See the first report on reservations to treaties, mentioned in footnote 1 above, document A/CN.4/470, paras. 33 and 35.

be bound by the treaty a certain term which will vary the legal effect of the treaty in its application between that State and the other party or parties to the treaty. An explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation."[72]

58. The Special Rapporteur provided no commentary to this draft definition, believing it to be self-explanatory,[73] and strangely enough the Commission did not consider it, because the Special Rapporteur had suggested that the definitions (which were then set forth in draft article 1) could be taken up as appropriate in the course of the discussion.[74]

59. The question of the definition of reservations, though never taken up per se, was touched upon several times during the long discussion of the legal regime of reservations which took place at the fourteenth session. Interesting comments were made on that occasion. Thus, Mr. Lachs, who considered that on the whole the proposed definition was sound, felt that "an essential feature of a reservation was its unilateral character".[75] He particularly congratulated the Special Rapporteur on "the felicitous precision of the phrase 'which will vary the legal effect of the treaty'. That sentence also covered the cases, which were not unknown, where a reservation, instead of restricting, extended the obligations assumed by the party in question."[76]

60. During the same discussion, Mr. Castrén expressed doubt as to the wisdom of retaining the second sentence of the definition proposed by Sir Humphrey Waldock; in his view, "the explanatory and other statements referred to were rare in practice; moreover, if they occurred, it was difficult to see which authority was to decide the nature of the statement".[77] Although Mr. Tsuruoka urged that the distinction be maintained,[78] the allusion to explanatory statements disappeared as a result of circumstances which cannot be determined from a reading of the summary records.

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[72] Article 1 (1), *Yearbook ... 1962*, vol. II, pp. 31-32, A/CN.4/144.

[73] Ibid., p. 34, para. 14.

[74] *Yearbook ... 1962*, vol. I, 637th meeting, 7 May 1962, p. 47, para. 32. The same course was followed in 1965 during the second reading of the draft articles (*Yearbook ... 1965*, vol. I, 778th meeting, 6 May 1965, p. 17, para. 11).

[75] *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 142, para. 49. Similar views were expressed by Mr. Rosenne, ibid., p. 144, para. 78, and Mr. Tunkin, who agreed with the view that "a reservation was a kind of offer by the reserving State, which the other Parties, in the exercise of their sovereignty, were free to accept or to reject" (653rd meeting, 29 May 1962, p. 156, para. 25). Mr. Paredes did not quite agree with that view, because more than one State might make "identical reservations, jointly or separately" (ibid., 651st meeting, 25 May 1962, p. 146, para. 87); the present Special Rapporteur feels that this circumstance (which may in fact arise) does not call in question the unilateral character of each of those identical reservations.

[76] Ibid. It is interesting to note that, during the consideration of the first report on reservations to treaties, Mr. Tomuschat likewise approached the question from this angle, but took a totally opposite position (see A/CN.4/SR.2401, 16 June 1995, pp. 4, 5 and 6; for the opposing view, see the position adopted by Mr. Bowett, ibid., pp. 6 and 7). In its comments on the draft articles adopted in first reading, the Government of Japan likewise considered "that the words 'or vary' should be replaced by the words 'or restrict' because, in its view, only a statement which restricts the legal effect of a provision properly falls within the meaning of the term 'reservation'". Sir Humphrey Waldock contested that view, arguing that "a unilateral statement in which a State purports to interpret a provision as conferring upon it a larger right than is apparently created by the language of the provision, or purports to impose a condition enlarging its rights, would seem to require to be treated as a 'reservation'" (*Yearbook ... 1965*, vol. II, p. 15, document A/CN.4/177 and Add.1 and 2).

[77] *Yearbook ... 1962*, vol. I, 652nd meeting, 28 May 1962, p. 148, para. 27.

[78] Ibid., p. 151, para. 64.

61. In any event, the draft definition was referred to the Drafting Committee, which produced a text more elegant than that proposed by the Special Rapporteur; the second sentence of the latter text had been deleted without explanation. The new text read as follows:

> "(f) 'reservation' means a unilateral statement made by a State, when signing, ratifying, acceding to, accepting or approving[79] a treaty, whereby it purports to exclude or vary the legal effect of some provisions of the treaty in its application to that State".[80]

This text was adopted in the plenary meeting without discussion and without a vote.[81]

62. However, the slow evolution of the definition of reservations ultimately used in the Vienna Convention had not yet come to an end.[82] The definition still lacked precision on a point of some importance, which is covered in the final text: the irrelevance of phrasing or naming. This addition results from the mysterious transmutation effected by the Drafting Committee in 1965, at the seventeenth session. When introducing this clarification, Sir Humphrey Waldock noted that in adopting it, "the Drafting Committee had sought to bring out that, however designated, any statement purporting to exclude or vary the legal effects of certain provisions of a treaty would constitute a reservation".[83] This draft definition, like the others, was adopted unanimously.[84]

63. Thereafter, the text of the definition[85] was not amended. The commentary that the Commission appended in its report to the General Assembly on the work of its eighteenth session (1966), which was used as a working document at the Vienna Conference, is therefore extremely important. It is short but significant for, once again, Commission tacitly contrasts the concept of a reservation with that of an interpretative declaration (even if the latter term is not actually used):

> "The need for this definition arises from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the Treaty as adopted".[86]

64. In these circumstances it may seem strange that the Commission did not follow the original intention of its Special Rapporteur[87] and complete the definition of a reservation by defining an interpretative declaration. Sir Humphrey Waldock explained this apparent reversal in his observations and proposals relating to the observations of the British and

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[79] The word "approve" was added by the Drafting Committee, for the sake of consistency with what subsequently became article 11 of the Convention.

[80] *Yearbook ... 1962*, vol. I, 666th meeting, 22 June 1962, p. 239, para. 1.

[81] Ibid., p. 240, para. 9.

[82] In accordance with a suggestion by the Government of Israel, the English text (which read "statement ... whereby it purports to exclude or vary the legal effect of *some* provisions") was brought into line with the French and Spanish texts ("*certaines* dispositions", "*algunas* dispociones") (*Yearbook ... 1965*, vol. II, p. 15, document A/CN.4/177 and Add.1 and 2).

[83] *Yearbook ... 1965*, vol. I, 820th meeting, 8 July 1965, p. 308, para. 20.

[84] Ibid., p. 308, para. 26.

[85] Reproduced in *Yearbook ... 1965*, vol. II, p. 160 and in *Yearbook ... 1966*, vol. II, p. 178.

[86] *Yearbook ... 1966*, vol. II, commentary to article 2, pp. 189-190, para. (11).

[87] See para. 54 above.

Japanese Governments, which were concerned because the draft did not mention "interpretative declarations".[88] His response deserves to be quoted at length:

> "The Japanese Government notes that not infrequently a difficulty arises in practice of determining whether a statement has the character of a [reservation] or of an [interpretative declaration] and suggests the insertion of a new provision ... to overcome the difficulty. This suggestion appears to the Special Rapporteur to overlook the fact that the term 'reservation' is already defined in article 1, paragraph 1 (f), in terms which indicate that it is something other than a mere interpretative understanding of the provision to which it relates.[89]

This indicates yet again that the concepts of reservation and interpretative declaration can only be defined in relation to each other.

65. Sir Humphrey Waldock adds:

> "Statements of interpretation were not dealt with by the Commission in the present section [on reservations] for the simple reason that they are not reservations and appear to concern the interpretation rather than the conclusion of treaties. In short, they appear to fall under the articles [relating to interpretation]."[90]

66. Either inadvertently or with the intention of avoiding further discussion of this difficult issue at a very late stage in the work, the Special Rapporteur did not tackle the problem of the definition and legal regime of interpretative declarations in his sixth report. However, when commenting in that report on the observations of Governments, he did revert to questions linked to the interpretation of treaties. Furthermore, responding to a suggestion by the United States, he observed: "It would seem clear on principle that a unilateral document cannot be regarded as part of the 'context' for the purpose of interpreting a treaty, unless its relevance for the interpretation of the treaty or for determining the conditions of the particular State's acceptance of the treaty is acquiesced in by the other parties". He emphasized that the "essential point" was "the need for express or implied assent".[91] In any case, the definition of interpretative declarations was not mentioned.

67. At the Vienna Conference, six States submitted amendments to article 2, paragraph 1 (d), of the Commission's draft,[92] which were referred to the Drafting Committee. The Hungarian amendment was undoubtedly the broadest in scope.[93] Like China and Chile, Hungary wished to specify that a reservation could only be formulated with respect to a multilateral treaty, but above all, it wished it to be acknowledged that a reservation could

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[88] See *Yearbook ... 1965*, vol. II, p. 46.

[89] Ibid., p. 49, para. 1.

[90] Ibid., para. 2, the Special Rapporteur added a number of very interesting comments concerning the legal regime of interpretative declarations, to which it will be helpful to revert at a later stage.

[91] *Yearbook ... 1966*, vol. II, commentary to articles 69, 70 and 71, p. 98, para. 16.

[92] These countries were Sweden, China, the United States, Chile, Hungary and Viet Nam. See *Report of the Committee of the Whole on its work at the first session of the Conference* (A/CONF.39/14), vol. I, para. 35; *Report of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969*, Documents of the Conference (United Nations publication, Sales No. E.70.V.5).

[93] Ibid., para. 35 (vi) (e). See also the explanations given by the Hungarian representative, Mr. Haraszti, *Report of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF 39/11), 4th meeting, 29 March 1968, paras. 24 and 25.

be designed not only "to exclude or to vary the legal effect" of certain provisions of a treaty, but also to *interpret* that legal effect.[94]

68. If an amendment along these lines had been adopted, the concept of a reservation would have encompassed, and could not have been disassociated from, the concept of an interpretative declaration.[95] However, the Hungarian amendment, like the other amendments submitted, was not adopted. The Drafting Committee considered them all "superfluous",[96] and reproduced the text adopted by the Commission.[97] That text was adopted by the Committee of the Whole without a vote,[98] and then by the Conference by 94 votes to none, with 3 abstentions.[99]

(ii) The 1978 and 1986 Vienna Conventions

69. The question of the definition of reservations gave rise to no substantive discussion during the preparation of the 1978 Vienna Convention on Succession of States in respect of Treaties and of the 1986 Vienna Convention on Treaties between States and International Organizations or between International Organizations. In both cases it was more or less taken for granted that the definition adopted in 1969 would be used again.

70. With regard to the Convention on Succession of States in respect of Treaties, Sir Humphrey Waldock, once again the Special Rapporteur, did not propose the inclusion of a definition of reservations in the draft articles and explained that "personally, he thought that cross-reference to the 1969 Vienna Convention on the Law of Treaties would be convenient as it would avoid having to frame a set of provisions on *such difficult questions as reservations*".[100] The principle of such a referral having been called in question, not without reason,[101] the Drafting Committee adopted a definition of reservations which was in turn adopted by the Commission as part of the draft articles on succession of States in

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[94] This wording is rather strange, for although the meaning of "interpreting a treaty" is clear [?], the idea of "interpreting its legal effect" is more obscure. (See in this connection the position of Austria, ibid., Committee of the Whole, 6th meeting, para. 17.)

[95] "It was ... preferable to provide expressly that declarations as to interpretation were to be treated as reservations" (Mr. Haraszti, ibid., 4th meeting, para. 25).

[96] *Report of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April-22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1), Committee of the Whole, 150th meeting, 25 April 1969, para. 28. The Hungarian amendment nevertheless received a certain amount of support during the discussion in the Committee of the Whole; see the aforementioned *Summary records* (footnote 93), 5th meeting, 29 March 1968: Syria (para. 5), Greece (para. 16), Italy (para. 22), Czechoslovakia (para. 30), Lebanon (para. 43), Sweden (para. 54), Bulgaria (para. 58), Argentina (para. 69), USSR (para. 86), Mongolia (6th meeting, 1 April 1968, para. 2), Central African Republic (para. 22). It is open to question, however, whether most of the speakers were not expressing support for the addition of the word "unilateral" rather than for the idea of treating interpretative declarations as reservations, which was opposed by the United Kingdom (5th meeting, para. 96), the United States (para. 116), Ireland (6th meeting, para. 18) and Sir Humphrey Waldock, Expert Consultant (para. 28).

[97] At least in the case of the French text; the English and Russian texts were changed so as to bring the order of the words "signing, ratifying, accepting or approving" into line with that used in article 16 (which became article 11) of the Convention, as had already been done in the other versions (cf. ibid.).

[98] See the *Report of the Committee of the Whole on its work at the second session of the Conference* (A/CONF.39/15), paras. 25 and 26.

[99] *Summary records* mentioned above (footnote 96), 28th plenary meeting, 16 May 1969, para. 48.

[100] *Yearbook ... 1972*, vol. I, Summary records of the twenty-fourth session, 1158th meeting, 15 May 1972, p. 42, para. 9; emphasis added.

[101] For a forceful argument against referral, see for example the statement by Mr. Ushakov at the 1272nd meeting, 6 June 1974, *Yearbook... 1974*, vol. I, pp. 115-116, para. 31.

respect of treaties on 5 July 1972[102] and remained unchanged thereafter. As noted in the report of the Commission on the work of its twenty-fourth session, that definition "reproduces the wording ... of the Vienna Convention" of 1969.[103]

71. No Government commented on the definition[104] and it was reproduced without change in the Commission's final report on the topic, with the same commentary as in 1972.[105]

72. No amendments were proposed to the text, which was adopted by the Conference at the same time as the rest of article 2;[106] the question of the definition of reservations was not even mentioned.

73. With regard to the definition of reservations in article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, the text originates in the proposal made by the Special Rapporteur, Mr. Paul Reuter, in his third report, issued in 1974. That definition was based on the 1969 definition, the only difference being the addition of a reference to international organizations as well as States.

74. In his commentary, the Special Rapporteur observed:

> "There is apparently no theoretical or practical reason to depart from the definition of reservations given in the 1969 Convention. It will be noted, however, that the fact that international organizations are not parties to multilateral treaties would suffice to explain why the practice of reservations does not exist among international organizations."[107]

75. On that basis, the Commission provisionally adopted a text which reflects its perplexity since, rather than reproducing the somewhat cumbersome list of ways of expressing consent contained in the 1969 definition, it proposed to simplify that wording by saying only: "'reservation' means a unilateral statement, however phrased or named, made by a State or by an international organization when signing or consenting [*by any agreed means*] to be bound by a treaty ...".[108]

76. According to the commentary, this change, based on an amendment by Poland and the United States at the Vienna Conference,[109] which is the origin of the existing article 11 of the 1969 Convention (but which was not adopted in its original form)[110] has "the twofold advantage of being simpler than the corresponding provision of the Vienna Convention and

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[102] *Yearbook ... 1972*, vol. I, 1196th meeting, p. 271, para. 33.

[103] *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, commentary to draft article 2, para. (8), pp. 231-232.

[104] See the first report on succession of States in respect of treaties by Sir Francis Vallat, *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/278 and Add.1-6, p. 32, para. 151.

[105] *Yearbook ... 1974*, vol. II (Part One), report of the International Law Commission on the work of its twenty-sixth session, document A/9610/Rev.1, para. (11) of the commentary to draft article 2, p. 176.

[106] *Report of the United Nations Conference on Succession of States in respect of Treaties, Resumed session, Vienna, 31 July-23 August 1978*, vol. II, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.80/10/Add.1), 14th plenary meeting of the Conference, 22 August 1978, para. 9. See also Committee of the Whole, 52nd meeting, 15 August 1978, para. 73 (provisional adoption of the Commission's draft and referral to the Drafting Committee, by 71 votes to 5 with 1 abstention), and 56th meeting, 21 August 1978, para. 36 (adoption by consensus in second reading).

[107] *Yearbook ... 1974*, vol. II (Part One), p. 141, document A/CN.4/279.

[108] *Yearbook ... 1974*, vol. II (Part One), report of the International Law Commission on the work of its twenty-sixth session, document A/9610/Rev.1, p. 294, emphasis added.

[109] Report of Commission mentioned above (footnote 92), document A/CONF.39/14, vol. I, para. 104 (a).

[110] Ibid., paras. 106-108.

of leaving in abeyance the question whether the terms 'ratification', 'acceptance', 'approval', and 'accession' could also be used in connexion with acts whereby an organization expressed its consent to be bound by a treaty".[111]

77. However, after adopting new provisions[112] which established an "act of formal confirmation" for international organizations as equivalent to ratification for States, the Commission, at its thirty-third session, in 1981, "saw no reason that would justify the maintenance of the first reading text as opposed to returning to a text which could now more closely follow that of the corresponding definition given in the Vienna Convention".[113] It therefore reproduced the 1969 definition and added the act of formal confirmation to the list of circumstances in which a reservation could be made.[114] The Commission's final report on the draft, issued in 1982, reproduced the same text, accompanied by the same commentary.[115]

78. The Commission's text was adopted, without change or debate and by consensus, on 18 March 1986, by the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations;[116] no amendments were proposed.

(b) Text of the definition

79. Article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties of 23 May 1969 reads as follows:

> **"'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".**

80. This definition is reproduced without change in article 2, paragraph 1 (j), of the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, which nevertheless adds a reference to the various circumstances in which a reservation can be made by a State "when making a notification of succession to a treaty":

> **"'reservation' means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty or *when making a notification of succession to a treaty*, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".**[117]

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[111] *Yearbook ... 1974*, vol. II, (Part One), document A/9610/Rev.1, para. (4) of the commentary to draft article 2, p. 295. For the Commission's discussion of this provision, see *Yearbook ... 1974*, vol. I, 1279th meeting, 17 June 1974, pp. 162, 164, paras. 55-56 and 72, and 1291st meeting, 9 July 1974, pp. 231-232, paras. 15-20.

[112] Article 2, paragraphs 1 (b) and 1 (b *bis*) and article 11.

[113] *Yearbook ... 1981*, vol. II, (Part Two), commentary to draft article 2, p. 123, para. (14), for the Commission's discussion of this initiative, apparently taken by the Drafting Committee, see the summary record of the 1692nd meeting, 16 July 1981, *Yearbook ... 1981*, vol. I, p. 262, paras. 13-17.

[114] *Yearbook ... 1981*, vol. II, (Part Two), p. 121.

[115] *Yearbook ... 1982*, vol. II, (Part Two), commentary to draft article 2, pp. 19-20, paras. (12)-(14).

[116] *Report of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations*, Vienna, 18 February-21 March 1986, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, 5th plenary meeting, 18 March 1986, para. 21.

[117] The words in italics indicate the addition made to the 1969 text.

81. The 1969 definition was also the model for that given in article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, which nevertheless, in accordance with its object, adapted the earlier definition to treaties concluded by international organizations:

> **"'reservation' means a unilateral statement, however phrased or named, made by a State or *by an international organization* when signing, ratifying, *formally confirming*, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State *or to that organization*".**[118]

82. These texts, based on the 1969 definition and adapted to the particular object of the other two Conventions, are not mutually contradictory but on the contrary usefully complement each other. The various elements of those texts can be combined to produce the following composite text:[119]

> ***"'reservation' means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or [by a State] when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization".***

83. Each of the three Conventions states explicitly that the definitions are given "for the purposes of the present Convention".

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[118] The words in italics indicate the additions made to the 1969 text.

[119] With reference to this idea, see para. 40 above.